TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 174.

NICHOLAS V. HALTER AND HARRY V. HAYWARD,
PLAINTIFFS IN ERROR,

vs.

THE STATE OF NEBRASKA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED DECEMBER 28, 1905.

(20,026.)

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1 No. 13955.

NICHOLAS HALTER, NARRY V. HAYWARD
v.
STATE OF NEBRASKA.

Pleas Before the Supreme Court of the State of Nebraska, at a term thereof begun and holden at the Capitol, in the City of Lincoln, in said State on the 19th day of September, A. D. 1905.

Present: Hon. Silas A. Holcomb, Chief Justice, Hon. S. H. Sedgwick, Judge, Hon. John B. Barnes, Judge.

Attest: H. C. LINDSAY, *Clerk.*

Be it Remembered, That on the 21st day of September, 1904, there was filed in the office of the Clerk of said Supreme Court a certain Petition in Error in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

NICHOLAS V. HALTER, HARRY V. HAYWARD, Plaintiffs in Error,
v.
STATE OF NEBRASKA, Defendant in Error.

Petition in Error.

Come now the plaintiffs in error and show to the Court that on the 8th day of July, 1904, in the District Court of Douglas county, Nebraska, in an action therein pending wherein the State of Nebraska was plaintiff, Nicholas V. Halter and Harry V.
2 Hayward were defendants. Said defendant in error recovered a judgment and verdict against said plaintiffs in error finding said plaintiffs in error guilty of misdemeanor and judging that each of said plaintiffs in error pay a fine of $50.00, and for costs of said prosecution. A transcript of the proceedings containing said judgment is filed herewith. Plaintiffs in error allege that there was error in the rulings and judgment of the Court in this:

1. The Court erred in overruling the objection of the plaintiffs in error herein to the introduction of any testimony or evidence whatever in this case.

2. The Court erred in overruling the motion of the plaintiffs in error to instruct the jury to return a verdict for the plaintiffs in error, for the following reasons:

3. That the law upon which this information is based is in violation of the constitution- of the State of Nebraska and of the United States, and particularly section one, of article 14 of the amendments of the constitution of the United States and therefore null and void.

4. That the law upon which this information is based infringes upon the personal liberty guaranteed to the plaintiffs in error by the

constitution of the United States and the constitution of the State of Nebraska, and also deprives the plaintiffs in error as citizens of the United States, of the right of exercising a privilege, impliedly if not expressly guaranteed to them by the Federal constitution and the laws of the United States.

5. That the laws upon which this complaint is based permits the use of the National flag by publishers and newspapers, books
3 and periodicals, and forbids its use, under penalty for advertising purposes generally, thus discriminating in favor of one class and against others, and is, therefore class legislation and null and void.

6. That the verdict is not sustained by sufficient evidence.

7. That the verdict is contrary to law.

8. Errors of law occurring at the trial.

9. The Court erred in giving instruction number one, duly excepted to at the trial.

10. The Court erred in giving instruction number two, duly excepted to at the trial.

11. The Court erred in overruling the motion of said plaintiffs and each of them for a new trial.

12. The Court having erred against said plaintiffs in error as set forth in paragraphs one to ten inclusive herein, the said plaintiffs for said reasons were entitled to a new trial and the Court therefore erred in overruling said motion of plaintiffs for a new trial. Wherefore the plaintiffs in error pray that the judgment of the lower Court be set aside and a new trial granted.

COOPER & DUNN AND
S. R. RUSH,
Att'ys for Pl'ffs in Error.

Endorsed: 13955. Halter, *et al. v.* State. Petition in Error. Supreme Court of Nebraska. Filed Sep. 21 1904. H. C. Lindsay, Clerk.

And on the same day there was filed in the office of the
4 Clerk of said Supreme Court a certain Transcript in the words and figures following, to-wit:

C. Doc. 8, No. 137.

STATE OF NEBRASKA, Plaintiff,
v.
H. V. HAYWARD and NICHOLAS V. HALTER, Defendants.

Transcript to Supreme Court.

For I. J. Dunn and S. R. Rush.

Transcript Fees	$4.35
Binding fees	.75
Total	$5.10 Pd. by Defendants.

FRANK A. BROADWELL, *Clerk,*
By JOHN H. GROSSMAN, *Deputy.*

App. Doc. 8, Number 137.

Pleas before the Honorable E. M. Bartlett one of the Judges and the presiding Judge, of the District Court of the Fourth Judicial District of the State of Nebraska, at a Term thereof within and for the County of Douglas, begun and held at the city of Omaha, on the 2nd day of May, A. D., 1904.

Information.

Be it Remembered, That heretofore, to-wit: On the 27th day of June, A. D., 1904, James P. English, County Attorney in and for the County of Douglas and State of Nebraska, filed in the
5 office of the Clerk of said Court, an Information against H. V. Hayward, for Desecration of Flag, which said Information reads and is in the words and figures following, to-wit:

STATE OF NEBRASKA, *County of Douglas, ss:*

Of the May Term of the District Court of the Fourth Judicial District of the State of Nebraska, within and for the County of Douglas, and State of Nebraska, in the year of our Lord nineteen hundred and four, I, Jas. P. English County Attorney, in and for the County of Douglas in said State of Nebraska, who prosecutes for and on behalf of said State, in the District Court of said District, sitting in and for said County of Douglas, and duly empowered by law to inform of offences committed in said County of Douglas, come now here in the name and by the authority of the State of Nebraska, and give the court to understand and be informed, that on the 28th day of December in the year of our Lord nineteen hundred and three, H. V. Hayward and Nicholas V. Halter late of the County of Douglas aforesaid, in the County of Douglas and State of Nebraska, aforesaid, then and there being, did then and there unlawfully expose to public view, sell, expose for sale, and have in their possession for sale an article to-wit: a bottle of beer, being an article of merchandize, upon which said bottle of beer was attached and placed a label upon which was printed and painted a representation of the flag of the United States of America, to advertise, call attention to, decorate, mark and distinguish the said article, namely said bottle of beer, on which the said label containing said
6 representation of the flag of the United States of America was so placed, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Nebraska.

JAMES P. ENGLISH,
County Attorney.

STATE OF NEBRASKA, *County of Douglas, ss:*

I, James P. English being first duly sworn, on oath depose and say that I know the contents of the foregoing information; that I

have read the same, and the facts set forth in said information are true, to the best of my knowledge and belief.

JAMES P. ENGLISH.

Subscribed in my presence and sworn to before me this 27th day of June, A. D., 1904.

FRANK A. BROADWELL,
Clerk of the District Court,
[SEAL.] By JOHN H. GROSSMANN, *Deputy.*

Indorsed: App. Doc. 8. No. 137. District Court, Douglas County The State of Nebraska, *vs.* H. V. Hayward, *et al.* Information. Charge *Discretion* of flag. Filed June 27th, 1904. Frank A. Broadwell, Clerk. By John H. Grossmann, Deputy. June, 27th, 1904. Defendants arraigned and waive reading of information. Plea not guilty. Frank A. Broadwell, Clerk. Witnesses: John H. Berger.

Afterward, at the May term of Court and on the 27th day of June, 1904, Trial was had and Verdict rendered herein as
7 appears on Page 472, Journal 89, and is in the words and figures following, to-wit:

Trial.

8–137.

THE STATE OF NEBRASKA, Plaintiff,
v.
H. V. HAYWARD and NICHOLAS V. HALTER, Defendants.

Information: Desecration of the Flag of U. S.

Comes now the County Attorney on behalf of the State of Nebraska, the said defendants Harry V. Hayward and Nicholas V. Halter, being also present, attended by their counsel; and the said defendants in open Court waiving the reading of the information herein and being duly arraigned for plea thereto they and each of them say they are not guilty as charged therein.

Wherein the said defendants being duly arraigned for trial, come the following named persons as jurors, to-wit:

F. J. Fitch,	Jno. Brew,	Jim Mogensen,
J. B. Evans,	A. J. Harder,	A. A. McDonald,
Frank Hardy,	Jos. Flood,	C. H. Lear,
W. S. Sheldon,	Jno. F. Buckley,	Emil Motz,

and said parties waiving the examination of said jurors for cause, said jurors are duly impaneled and sworn according to law, and this cause proceeds.

And now this cause is heard upon the motion of the said defendants to direct the said jury to return herein a verdict of not guilty.

Upon consideration whereof, the Court being well advised in
8 the premises, it is by the Court ordered that the said motion be, and it hereby is, overruled. To which ruling of the Court the said defendants duly except.

Afterward on the 27th day of June, 1904, Charge of the Court was filed herein, which said Charge of the Court is in the words and figures following, to-wit:

Charge of Court.

In District Court, Douglas County, Nebraska.

STATE OF NEBRASKA, Plaintiff,
v.
HARRY V. HAYWARD and NICHOLAS V. HALTER, Defendants.

Instructions to the Jury Given by the Court on its Own Motion.

GENTLEMAN OF THE JURY:

(*Instruction No.* 1.)

In this case the State of Nebraska has filed information against the defendants above named, charging that on the 28 day of December, in the year of our Lord nineteen hundred and three, the said defendants, being then and there in the County of Douglas and State of Nebraska, did then and there unlawfully expose to public view, sell, expose for sale, and have in their possession for sale, an article, to-wit, a bottle of beer, being an article of merchandise, upon which said bottle of beer was attached and placed a label upon which was printed and painted a representation of the flag of the United States of America, to advertise, call attention to, decorate, mark and distinguish the said article, namely said bottle of beer, on which the said label containing said representation of the flag of the
9 United States of America was so placed; contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Nebraska. Given. E. M. Bartlett, Judge.

2. You are instructed that if you find from the evidence, beyond a reasonable doubt did on the 28 day of December, in the year of our Lord nineteen hundred and three, the said defendants, being then and there in the county of Douglas and State of Nebraska, did then and there expose to public view, sell, expose for sale, and have in their possession for sale, a bottle of beer, being an article of merchandise, upon which said bottle of beer was attached and placed a label upon which was printed and painted a representation of the flag of the United States of America, to advertise, call attention to, decorate, mark and distinguish the said article, namely said bottle of beer, on which the said label containng said representation of the flag of the United States of America was so placed; then and in that

case you should return a verdict of guilty in manner and form as charged in the information.

If on the other hand you should find that the evidence in this case does not sustain the charges against the defendants, as set forth in the first instructions of the Court herein, then you should find the defendants not guilty. Given. E. M. Bartlett, Judge.

Upon retiring to your room to deliberate concerning your verdict you will select one of your number as foreman. When you have agreed upon a verdict you will have your foreman sign the same, when you will all return into Court, in a body, with your verdict. Given. E. M. Bartlett, Judge.

Indorsed: C. 8. 137. State of Nebraska, *vs.* Harry V. Hayward and Nicholas V. Halter. Instructions to the Jury. Filed Jun- 27, 1904. Frank A. Broadwell, Clerk. Entered.

Defendants' Exceptions.

Afterward, on the 27th day of June, 1904, Defendants' exceptions were filed herein, which said Exceptions are in the words and figures following, to-wit:

In the District Court of Douglas County, Nebraska.

THE STATE OF NEBRASKA, Plaintiff,
v.
HARRY V. HAYWARD and NICHOLAS V. HALTER, Defendants.

Exceptions.

Come now the defendants and each of them and each for himself except- to instruction number one and two given by the court on its own motion.

HARRY V. HAWYARD,
NICHOLAS V. HALTER,
By COOPER & DUNN,
S. R. RUSH, *Their Attorneys.*

June 27, 1904.
Exception allowed,
E. M. BARTLETT.

Indorsed: C. 8, No. 137. In District Court of Douglas Co. State *v.* Hawyard, *et al.* Exception to instructions. Filed Jun. 27, 1904. Frank A. Broadwell, Clerk. Entered. Cooper & Dunn, S. R. Rush, For Def'ts.

And now the said jury having heard the statement of the case the testimony adduced, the argument of counsel and the instructions of the Court retire in charge of a sworn officer of the Court to deliberate upon their verdict.

And now come the said jury in open Court — present to the Court their verdict in writing as follows, to-wit:

Verdict.

STATE OF NEBRASKA:

In the District — of Douglas County.

STATE OF NEBRASKA, Plaintiff,
v.
H. V. HAYWARD and NICHOLAS V. HALTER, Defendant-.

Verdict.

We, the jury duly empaneled and sworn to try the issue joined between the said parties do find the defendant-, Harry V. Hayward and Nicholas V. Halter guilty as charged in the information.

A. J. HARDER, *Foreman.*

Whereupon the said jury are discharged from further consideration of this case.

12 Afterward, on the 28th day of June, 1904, Motion for New trial was filed herein, which said Motion for New Trial is in the words and figures following, to-wit:

In the District Court in and for Douglas County, Nebraska.

STATE OF NEBRASKA, Plaintiff,
v.
NICHOLAS V. HALTER, HARRY V. HAYWARD, Defendant-.

Motion for a New Trial.

The defendant Nicholas V. Halter, moves the Court for a new trial in the above entitled cause for the following reasons effecting materially his substantial rights:

1. That the Court erred in overruling the objections of the defendant herein to the introduction of any testimony or evidence whatever in this case.

2. The Court erred in overruling the motion of the defendant to instruct the jury to return a verdict for the defendant, for the following reasons:

A. That the law upon which this information is based is in violation of the constitution of the State of Nebraska and of the United States, and particularly section one, of article 14 of the amendments to the constitution of the United States and therefore null and void.

B. That the law upon which this information is based infringes upon the personal liberty guaranteed to the defendant by the constitution of the United States and the constitution of the State of Nebraska, and also deprives the defendant as a citizen of the United States, of the right of exercising a privilege, impliedly if not expressly guaranteed to him by the Federal constitution and the laws of the United States.

C. That the law upon which this complaint is based per-
13 mits the use of the National Flag by publishers and newspapers, books and periodicals, but forbids its use, under penalty for advertising purposes generally, thus discriminating in favor of one class and against other-, and is, therefore, class legislation and null and void.

3. That the verdict is not sustained by sufficient evidence.

4. That the verdict is contrary to law.

5. Errors of law occurring at the trial.

6. The Court erred in giving instructions numbered one and two, duly excepted to at the trial.

I. J. DUNN,
S. R. RUSH,
Attorneys for Defendants.

(Indorsed:) Doc. 8. No. 137. District Court, Douglas County, State of Nebraska, *vs.* Nicholas V. Halter and Harry V. Hayward. Motion for new trial. Filed June 28, 1904. Frank A. Broadwell, Clerk. Entered. I. J. Dunn, S. R. Rush, Att'ys for Def'ts.

Afterward, on the 28th day of June, 1904, Motion for New Trial was filed herein, which said Motion is in the words and figures following, to-wit:

Motion for New Trial.

In the District Court in and for Douglas County, Nebraska.

STATE OF NEBRASKA
vs.
NICHOLAS V. HALTER, HARRY V. HAYWARD.

Motion for a New Trial.

14 The defendant Harry V. Hayward moves the Court for a new trial in the above entitled cause for the following reasons effecting materially his substantial rights.

1. That the Court erred in overruling the objection of the defendant herein to the introduction of any testimony or evidence whatever in this case.

2. The Court erred in overruling the motion of the defendant to instruct the jury to return a verdict for the defendant for the following reasons:

a. That the law upon which this information is based is in violation of the constitution of the State of Nebraska and of the United States, and particularly section one, of article 14 of the amendments to the constitution of the United States and therefore null and void.

b. That the law upon which this information is based infringes upon the personal liberty guaranteed to the defendant by the constitution of the United States and the constitution of the State of Nebraska, and also deprives the defendant as a citizen of the United

States, of the right of exercising a privilege, impliedly if not expressly guaranteed to him by the Federal constitution and the laws of the United States.

c. That the law upon which this complaint is based permits the use of the national flag by publishers and newspapers, books and periodicals, but forbids its use, under penalty for advertising purposes generally, thus discriminating in favor of one class and against other-, and is, therefore class legislation and null and void.

3. That the verdict is not sustained by sufficient evidence.

4. That the verdict is contrary to law.

5. Errors of law occurring at the trial.

6. The Court erred in giving instructions numbered one and two, duly excepted to at the trial.

I. J. DUNN,
S. R. RUSH,
Attorneys for Defendants.

(Indorsed:) Doc. 8. No. 137. District Court, Douglas County, State of Nebraska, *vs.* Nicholas V. Halter and Harry V. Hayward. Motion for new trial. Filed Jun- 28, 1904. Frank A. Broadwell, Clerk. Entered. I. J. Dunn, S. R. Rush, Att'ys for Def'ts.

Afterward, at the May term of Court and on the 8th day of June, 1904, An Order overruling Motion and Judgment on Verdict was entered herein, as appears on Page 481, Journal 89, and is in the words and figures following, to wit:

Order Overruling Motion and Judgment on Verdict.

8–137.

THE STATE OF NEBRASKA, Plaintiff,
v.
H. V. HAYWARD and NICHOLAS V. HALTER, Defendants.

Information: Desecrating the Flag of U. S.

Comes now the County Attorney on behalf of the State of Nebraska, the said defendant H. V. Hayward (impleaded with Nicholas V. Halter), being also present, attended by his counsel. And now this cause comes on to be heard upon the motion of the said defendant for a new trial of this action. Upon consideration whereof, the Court being fully advised in the premises, it is by the Court ordered that the said motion be, and it hereby is, overruled. To which ruling of the Court the said defendant duly excepts. Whereupon the said defendant, H. V. Hayward, being duly arraigned for sentence, is informed by the Court of the verdict of guilty heretofore returned against him, of the consequences thereof and of the punishment attached by law thereto, and being inquired of if he has anything to say why the sentence of the Court should not now

be pronounced upon him, and showing no good and sufficient cause to the contrary.

It is therefore considered, ordered, and adjudged by the Court that the said defendant, H. V. Hayward, pay a fine in the sum of Fifty Dollars ($50) together with the costs of this prosecution, taxed at $— for all of which execution is hereby awarded.

To all of which the said defendant duly excepts, and is by the Court allowed forty (40) days from the rising of Court in which to prepare and serve his bill of exceptions herein.

Afterward, at the May term of Court and on the 8th day of July, 1904, Order overruling Motion and Judgment on Verdict was entered herein, as appears on Page 482, Journal 89, and is in the words and figures following, to-wit:

17 *Order Overruling Motion and Judgment on Verdict.*

8–137.

THE STATE OF NEBRASKA, Plaintiff,
v.
H. V. HAYWARD and NICHOLAS V. HALTER, Defendants.

Information: Desecration of Flag of U. S.

Comes now the County Attorney on behalf of the State of Nebraska, the said defendant, Nicholas V. Halter (impleaded with H. V. Hayward), being also present, attended by his counsel. And now this cause comes on to be heard upon the motion of the said defendant for a new trial of this action. Upon consideration whereof, the Court being well advised in the premises, it is by the Court ordered that the said motion be, and it hereby is, overruled. To which ruling of the Court the said defendant duly excepts.

Whereupon the said defendant, Nicholas V. Halter, being duly arraigned for sentence, is informed by the Court of the verdict of guilty heretofore returned against him, of the consequences thereof and of the punishment attached by law thereto, and being inquired of if he has anything to say why the sentence of the Court should not now be pronounced upon him, and showing no good and sufficient cause to the contrary. It is therefore considered, ordered and adjudged by the Court that the said defendant, Nicholas V. Halter, pay a fine in the sum of Fifty Dollars ($50), together with the costs of this prosecution, taxed at $—, for all of which execution is hereby awarded.

18 To all of which the said defendant duly excepts, and is by the Court allowed forty days from the rising of Court in which to prepare and serve his bill of exceptions herein.

E. M. BARTLETT, *Judge.*

Afterward, on the 26th day of August, 1904, a Bond was filed herein, which said Bond is in the words and figures following, to-wit:

Bond.

In the District Court of Douglas County, Nebraska.

THE STATE OF NEBRASKA, Plaintiff,
v.
HARRY V. HAYWARD and NICHOLAS V. HALTER, Defendants.

Bond.

Know all men by these presents: That on the — day of —, 1904, at the May term of the District Court of Douglas county, Nebraska, said defendants were convicted upon the charge of "desecrating the flag," and that there was a judgment entered therein, and a fine of $100 and costs assessed against each of said defendants, and

Whereas, said defendants intend to appeal said case to the Supreme Court of the State of Nebraska,

Now, therefore, we, the above named Harry V. Hayward and Nicholas V. Halter, principals, and Walter Moise surety, do undertake to the state of Nebraska, in the penal sum of $300.00 that the said defendants will prosecute said appeal without unnecessary delay, and if said judgment shall be affirmed in whole or in part, said defendants will appear in the District Court of Douglas County in response to the judgment thereof in said cause, and will satisfy the judgment and costs in said case.

19

NICHOLAS V. HALTER,
By I. J. DUNN, *His Attorney.*
HARRY V. HAYWARD.
WALTER MOISE.

The above bond approved this 26th day of August, 1904.
E. M. BARTLETT, *Judge.*

Indorsed: Doc. 8. No. 137. In the District Court of Douglas county, Nebraska. The State of Nebraska, Plaintiff, *vs.* Harry V. Hayward, and Nicholas V. Halter, Defendants. Bond. Filed August 26, 1904. Frank A. Broadwell, Clerk. Entered.

THE STATE OF NEBRASKA, *Douglas County, ss:*

I, Frank A. Broadwell, Clerk of the District Court, in and for Douglas County, Nebraska, do hereby certify that the foregoing is a full and true Transcript of the proceedings and record (see 55th Neb. p. 472) had in the cause in the District Court, containing the Information, Trial, Charge of Court, Verdict, Defendant's Exceptions. Motion for New Trial, Motion for New Trial, Order overruling Motion and Judgment on Verdict, Order Overruling Motion and Judgment on Verdict, Bond in the case of The State of Nebraska against H. V. Hayward, and Nicholas V. Halter, appearing of record in said Court.

20

Witness my signature and the seal of said Court at the City of Omaha, this 18th day of July, A. D., 1904.

[SEAL.] FRANK A. BROADWELL, *Clerk*,
By JOHN H. GROSSMANN, *Deputy*.

Endorsed: 13955. Halter, *et al.*, *v.* State. Transcript. Supreme Court of Nebraska Filed Sep. 21 1904. H. C. Lindsay, Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Bill of Exceptions in the words and figures following, to-wit:

STATE OF NEBRASKA
vs.
H. V. HAYWARD and NICHOLAS V. HALTER.

Entered.
Filed Aug. 26 1904.
FRANK A. BROADWELL, *Clerk*.
CHAS. W. PEARSALL, *Reporter*.

21 OMAHA, NEBRASKA, *Aug. 8th*, 1904.

Received from S. R. Rush and I. J. Dunn, Attorneys for defendants, herein, for examination and amendment, a draft of a bill of exceptions in the case of the State of Nebraska, *vs.* H. V. Hayward and Nicholas V. Halter, tried in the District Court of Douglas county, Nebraska, at the regular May, 1904, term of said Court.

JAMES P. ENGLISH,
County Attorney.
JOHN W. PARISH,
WILLIAM F. GURLEY,
Attorneys for State.

Filed Aug. 26 1904
FRANK A. BROADWELL, *Clerk*.

I herewith return the Bill of Exceptions in the within entitled cause, submitted to me on the — day of —, 1904, and propose — amendments.
Dated this — day of —, 1904.

——— ———.

Received within Bill of Exceptions from James P. English, County Attorney, John W. Parish and W. F. Gurley, Attorneys for Plaintiff, this 12th day of Aug, 1904.

———— ————,
Attorneys for Defendants.

Entered.

22 OMAHA, NEBRASKA, *Aug. 12th*, 1904.

It is hereby stipulated and agreed, by and between the parties hereto, plaintiff and defendants, that the within and following transcript is a true and complete copy of all the evidence, oral and documentary, offered or received upon the trial of the above entitled cause, by either of the parties hereto together with all objections and motions made by either party, the rulings of the Court on same, and the exceptions of the respective parties to such rulings.

JAMES P. ENGLISH,
County Attorney.
JOHN W. PARISH,
WILLIAM F. GURLEY,
Attorneys for Plaintiff.
I. J. DUNN,
S. R. RUSH,
Attorneys for Defendants.

Filed Aug. 26 1904

FRANK A. BROADWELL, *Clerk.*

Entered.

23 OMAHA, NEB., *August 26"*, 1904.

I hereby certify that the within and following is a full, true and complete copy of the proceedings had upon the trial of the case of State of Nebraska *vs.* Harry V. Hayward and Nicholas V. Halter, and that the same contains all of the evidence offered or given by either of said parties upon the trial of said case, and likewise contains all objections and motions relating to such evidence, made by either party, the rulings of the Court on such objections and motions, and the exceptions of the respective parties to such rulings.

I further certify that said trial was had at the time and place hereinafter mentioned, and that upon application of defendants, this Bill of Exceptions is allowed by me and ordered made a part of the record in this case.

By the court,

E. M. BARTLETT,
Judge of the District Court of the Fourth Judicial District, Who Tried Said Cause.

Filed Aug. 26, 1904.

FRANK A. BROADWELL, *Clerk.*

Entered.

24 STATE OF NEBRASKA, *Douglas County, ss:*

I, Frank A. Broadwell, Clerk of the District Court, Fourth Judicial District of the State of Nebraska, in and for said County do hereby certify that this is the original bill of exceptions filed in my office in the cause in said Court, wherein State of Nebraska is Plaintiff and H. V. Hayward *et al.* are defendants.

Witness my signature and official seal this 13th day of September, 1904.

FRANK A. BROADWELL, *Clerk*,
[SEAL.] By JOHN H. GROSSMANN, *Deputy*.

OMAHA, NEBRASKA, *July* 30, 1904.

I hereby certify that the following is a true and complete transcript of all the testimony, oral and documentary, offered or given by either of the parties hereto upon the trial of this cause, together with all the objections and motions made by either party, the rulings of the Court on the same, and the exceptions of the respective parties to such rulings, as shown by my shorthand notes taken upon the trial of said cause.

CHAS. W. PEARSALL,
Official Stenographic Reporter of the Fourth Judicial District, Who Reported Said Cause.

Filed Aug. 26, 1904.
FRANK A. BROADWELL, *Clerk*.

25 In the District Court for the County of Douglas.

Doc. —, No. —.

STATE OF NEBRASKA, Plaintiff,
v.
H. V. HAYWARD and NICHOLAS V. HALTER, Defendants.

Bill of Exceptions.

Be it remembered that within the District Court, within and for the County of Douglas, and State of Nebraska, at the regular May, 1904, Term thereof, to-wit, on the 27th day of June, 1904, before the Honorable E. M. Bartlett, one of the Judges of said Court, John W. Parish and W. F. Gurley, appearing for the plaintiff, and S. R. Rush and I. J. Dunn, appearing for the defendants, and said cause coming on for hearing before the Court and Jury, the following proceedings were had, viz:

The plaintiff to maintain the issues on its part to be maintained, produced the following evidence.

(Stamped:) Filed Aug. 26, 1904. Frank A. Broadwell, Clerk. Entered.

26 Mr. RUSH: Comes now the defendants and each of them and demur and object to the introduction of any testimony or evidence in this case whatever, for the following reasons:

The law upon which this complaint is based is in violation of the Constitution of the State of Nebraska and of the United States and particularly of Section One of Article Fourteen of the Amendments to the Constitution of the United States, and is null and void.

2. The defendants further object to the introduction of any testi-

mony or evidence whatever in this case for the reason that the law upon which this complaint is based infringes upon the personal liberty, guaranteed to the defendants by both the Constitution of the United States and the Constitution of the State of Nebraska, and also deprives the defendants as citizens of the United States of the right exercise the privilege impliedly, if not expressly, guaranteed to them by the Federal Constitution and the laws of the United States.

3. The defendants further object to the introduction of any testimony whatever under this complaint for the reason that the law upon which this complaint is based permits the use of the National flag for publishers, newspapers, periodicals, books, ornamental pictures and also on articles of jewelry, but forbids its use, under penalty, for advertising purposes generally, thus discriminating in favor of one class of occupations, and against all others and is therefore class legislation and null and void.

27 Objection is overruled. Defendants and each of them except.

Defendants herein, Harry V. Hayward and Nicholas V. Halter and each of them for himself admits that the facts with reference to the charge set forth in the information herein, are as follows, to-wit:

It is admitted that on the 28th day of December, A. D., 1903, the defendants were engaged in the retail liquor business in the City of Omaha, Douglas county, Nebraska, and on said day were engaged in selling and did sell beer in pint and quart bottles in their place of business in said City, County and State, as retail liquor dealers as charged in said information; that a large number of bottles of beer was sold by them at said place of business on said date, had on them three labels at different places on said bottles, all of said labels being of the same character except in size, and being practically the same label and similar to the label marked herein "Exhibit 1."

It is further admitted that on the day named in the information the defendants and each of them did expose to public view, sell, expose for sale, and had in their possession for sale said bottled beer above referred to, and upon each of said bottles there appeared said label marked, "Exhibit 1," and also upon each of said bottles appeared the two similar labels above referred to, an exact duplicate of said labels and each of them, being marked Exhibit 2, and Exhibit 3 respectively.

It is further admitted that the bottled beer above referred
28 to, on which appeared said labels was manufactured for sale and sold to the defendants by the Willow Springs Brewing Company, a corporation engaged in the manufacture and sale of beer in Douglas county, Nebraska; that the beer referred to is known as the "Stars and Stripes," and upon the bottles so sold by the said Willow Springs Brewing Company are placed the labels above referred to, marked Exhibits 1, 2 and 3 respectively.

That at the time of the filing of the complaint herein, to-wit, December 28th, 1903, said labels had been in use by said Willow Springs Brewing Company in the manner aforesaid for a long time, to-wit: since May 18th, 1902.

It is further admitted that on or about September 19th, 1903, the Government of the United States of America granted a patent to the said Willow Springs Brewing Company of the words used in said label, to-wit, "Stars and Stripes" (for beer).

It is also admitted by the parties hereto that said labels hereinbefore referred to marked Exhibits 1, 2 and 3 respectively have been used by the Willow Springs Brewing Company as a trade mark in the ordinary and usual course of business for advertising purposes and for the purposes of designating its particular product or brand of beer by the patent so designated from other similar products, of other Brewing companies; the said trade mark and advertising scheme is of special value to the said Willow Springs Brewing Company in its business, and to be deprived of said trade-mark and label as shown in Exhibit 1, would be a great financial injury to
29 the Willow Springs Brewing Company.

The purpose of said label was to advertise said brand of beer and to designate said brand from other products of a similar character.

It is admitted by the plaintiff and the defendants herein that all of the foregoing facts stated are true.

The State now offers in evidence, Exhibit No. 1 referred to in the agreed statement of facts. Same received without objection.

The State now offers in evidence Exhibit No. 2, referred to in the agreed statement of facts. Same received without objection.

The State now offers in evidence Exhibit No. 3, referred to in the agreed statement of facts. Same received without objection.

30 Comes now the defendants and each of them and moves the Court to instruct the Jury to return a verdict for the defendants and each of them, for the following reasons:

1. The law upon which this complaint is based is in violation of the Constitution of the State of Nebraska, and of the United States and particularly of Section One of Article Fourteen of the Amendments to the Constitution of the United States, and is null and void.

2. The defendants further object to the introduction of any testimony or evidence whatever in this case for the reason that the law upon which this complaint is based infringes upon the personal liberty, guaranteed to the defendants by both the Constitution of the United States and the Constitution of the State of Nebraska, and also deprives the defendants as citizens of the United States of the right to exercise the privilege impliedly, if not expressly, guaranteed to them by the Federal Constitution and the laws of the United States.

3. The defendants further object to the introduction of any testimony whatever under this complaint for the reason that the law upon which this complaint is based permits the use of the National flag for publishers, newspapers, periodicals, books, ornamental pictures and also on articles of jewelry, but forbids its use, under penalty, for advertising purposes generally, thus discriminating in favor of one class of occupations, and against all others and is therefore class legislation and null and void.

4. Also for the further reason that the evidence in the case
31 does not sustain the charge set forth in the information.

5. Also for the further reason that no offense is charged in the information under the Statutes of this State.

Motion overruled and the defendants and each of them except.

32 EXHIBIT No. 1.



33 STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that I have compared the foregoing copy of Exhibit No. 1, in the case of Halter *vs.* State, No. 13955, with the original now on file in my office, and that the same is a correct copy thereof, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 15th day of December, 1965.

[Seal of Supreme Court of Nebraska.]

H. C. LINDSAY, *Clerk.*

34 EXHIBIT No. 2.



35 STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that I have compared the foregoing copy of Exhibit No. 3, in the case of Halter *vs.* State, No. —, with the original now on file in my office, and that the same is a correct copy thereof, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 15th day of December, 1905.

[Seal of Supreme Court of Nebraska.]

H. C. LINDSAY, *Clerk.*

36 EXHIBIT No. 3.



37 STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that I have compared the foregoing copy of Exhibit No. 3, in the case of Halter *vs.* State, No. —, with the original now on file in my office, and that the same is a correct copy thereof, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 15th day of December, 1905.

[Seal of Supreme Court of Nebraska.]

H. C. LINDSAY, *Clerk.*

38 Endorsed: 8-137. Filed Aug. 26, 1904. Frank A. Broadwell, Clerk. Entered. 13955. Nicholas V. Halter, *et al., v.* State of Nebraska. Bill of Exceptions. Supreme Court of Nebraska. Filed Sep. 21, 1904. H. C. Lindsay, Clerk.

And on the same day there was issued out of the office of the Clerk of said Supreme Court a certain Summons in the words and figures following, to-wit:

Summons in Error.

THE STATE OF NEBRASKA, *ss:*

To the Sheriff of the County of Lancaster:

You are hereby commanded to notify the State of Nebraska that a petition in error has been filed in the Supreme Court of Nebraska by Nicholas V. Halter and Harry V. Hayward asking the reversal of a judgment against them rendered July 8th, 1904, in a certain cause in the District Court of Douglas County, wherein the State of Nebraska was Plaintiff and Nicholas V. Halter and Harry V. Hayward were Defendants and to appear before the Supreme Court, at the city of Lincoln, on the 3rd day of January, 1905, then and there to do and receive what the said Supreme Court shall order in the premises.

You will make due return of this summons on or before the 3rd day of January, 1905.

Witness my hand and the Seal of said Court, at the city of Lincoln, this twenty-first day of September, A. D. 1904.

[SEAL.] H. C. LINDSAY, *Clerk.*

39 And on the same day said Summons was returned and filed in the office of the Clerk of said Supreme Court with service endorsed thereon in words and figures as follows, to-wit:

Service of the within Summons in Error acknowledged this 21st day of September, 1904.

F. N. PROUT,
Attorney General.

Endorsed: 13955. Supreme Court State of Nebraska. Halter, *et al. v.* State of Nebraska. Summons in Error. Supreme Court of Nebraska. Filed Sep. 21 1904. H. C. Lindsay, Clerk.

And afterward, on the 20th day of January, the following among other proceedings were had and done, to-wit:

The following causes were submitted to Commission No. 2 on briefs of counsel:

* * * * * * *

13955. Halter *v.* State. Error to Douglas county.

And afterward, to-wit, on the 19th day of October, 1905, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain Judgment in the words and figures following, to-wit:

NICHOLAS V. HALTER, HARRY V. HAYWARD, Plaintiffs in Error,
v.
STATE OF NEBRASKA, Defendant in Error.

Error to the District Court of Douglas County. No. 13955.

40 This cause coming on to be heard upon proceedings in error to the district court of Douglas county, was argued by counsel and submitted to the court; upon full consideration whereof, the court doth find no error apparent in the record of the proceedings and judgment of said district court, and it is therefore considered, ordered and adjudged that the judgment of said district court be, and the same hereby is affirmed; that defendant in error pay all costs incurred herein by it, taxed at $—, and have and recover from plaintiffs in error all its costs so expended herein; that plaintiffs in error pay all costs incurred herein by them, taxed at $—, for all of which execution is hereby awarded, and that a mandate issue accordingly.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Opinion by said court, pursuant to which the preceding judgment was rendered, which opinion is in the words and figures following, to-wit:

41 No. 13955.

HALTER
v.
STATE OF NEBRASKA.

Opinion. Filed October 19, 1905.

Commissioner's Opinion, Department No. 2.

The power to prohibit the use of the national flag does not belong exclusively to the federal congress, but may be exercised by the several states.

2. Chap. 39, Laws of 1903 (Cobbey's Annotated Statutes, Secs. 2375*g, et seq.*), entitled "An Act to prevent and punish the desecration of the flag of the United States" is not obnoxious to the 14th amendment to the constitution of the United states, nor to the provisions of the state constitution against depriving any person of his property without due process of law, and against special or class legislation.
3. Notwithstanding the 14th amendment to the federal constitution the state, in the exercise of the police power, may enact such laws as are calculated to promote the health, comfort, safety and welfare of society, although such laws operate to restrict the liberty of citizens of the United States.
4. But whether legislation thus operating is in fact calculated to promote such ends, is a legitimate subject of inquiry by the court when the constitutionality of the act is assailed.
42 5. An act which is calculated to foster sentiments of patriotism is not vulnerable to the objection that it is not calculated to promote the welfare of society.

43 ALBERT, *C.:*

The defendant was convicted of a violation of the statute entitled "An Act to prevent and punish the desecration of the flag of the United States." (Chap. 139, Laws of 1903, Cobbey's Annotated Statutes, 2375*g, et seq.*)

It is conclusively established that the defendants were engaged in selling intoxicating liquors at retail, and sold and offered for sale beer contained in bottles, to which was attached a label, on which there was printed a representation of the flag of the United States, and that such label was so used to advertise the beer and distinguish it from other products of a like nature. It is admitted that the beer was sold to the defendants by a brewing company in the bottles thus labeled, and, that the representations of the flag thereon is a part of the registered trade mark of the brewing company.

It is now claimed that the statute under which the defendant was convicted is unconstitutional and consequently that the judgment of conviction must be reversed. The statute is as follows:

"Any person who in any manner, for exhibition or display shall place, or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color, or ensign, of the United States of America, or shall expose or cause to be exposed to public view any such flag, standard, color,
or ensign, upon which shall be printed, painted or otherwise
44 placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design or drawing, or any advertisement of any nature, or who shall expose, to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article or substance, being an article of merchandise, or a receptacle of merchandise, upon which shall have been printed, painted, attached or otherwise placed, a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, mark, or distinguished, the article, or substance on which so placed, or who shall

publicly mutilate, deface, defile, or defy, trample upon or cast contempt, either by words or act, upon any such flag, standard, color or ensign, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars, or by imprisonment for not more than thirty days, or both in the discretion of the court.

"The words flag, color, ensign, as used in this act shall include any flag, standard, ensign, or any picture or representation, or either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color or ensign, of the United States of America, or a picture, or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the
45 same, without deliberation may believe the same to *pre*present the flag, color, standard, or ensign, of the United States of America.

This act shall not apply to any act permitted by the statutes of the United States of America, or by the United States Army and Navy regulations, nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, or stationary for use in correspondence, on any of which shall be printed, painted or placed, said flag, disconnected from any advertisement."

The defendants take the position that the act contravenes Sec. 1 of the 14th Amendment to the Federal Constitution, which prohibits the states from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or, which shall deprive any person of life, liberty or property, without due process of law, and the provisions of the state constitution against special or class legislation. This position is supported by two cases, Ruhstrat *v.* People, 185 Ill., 133, 49 L. R. A., 181, and People *ex rel.* McPike *v.* Van de Carr, — N. Y., —, 70 N. E., 965. In each of these cases a statute, substantially like the one under consideration, was held unconstitutional.

The Illinois case rests on three propositions, which, for
46 convenience, we shall consider out of the order in which they are there discussed.

As to the first, namely, that the act is unconstitutional "as depriving a citizen of the United States of the right of exercising a privilege, impliedly, if not expressly, granted to him by the federal constitution," little need be said. The right to advertise whiskey, beer, tobacco and other articles of merchandise by the use of the national flag is certainly not the subject of an express constitutional grant, and it can be said to be impliedly granted only in the sense that, like an infinite number of other acts, it is not prohibited. If the fact that an act or course of action is not prohibited by the federal constitution gives a citizen of the United States a right which the state is powerless to abridge or restrict, the sphere of state legislation is more circumscribed than has been generally supposed, and our

criminal code is largely waste paper. A moment's reflection would seem sufficient to show that the proposition is utterly unsound.

Nor can we agree with counsel that the federal government has the exclusive power to regulate the use of the national flag. It is not infrequent that the same act is an offense against both the state and federal governments. Counterfeiting furnishes an apt illustration. The power "to provide for the punishment of counterfeiting the securities and current coin of the United States" is expressly given to Congress, but the offense is also punish-
47 able under the laws of the several states, the validity of which was upheld in Fox *v.* State, 5 How. (U. S.), 416.

The second proposition to be noticed is "that the act is also unduly discriminating and partial in its character." This proposition is based on the exceptions to the general provisions of the act. The exceptions enumerated in the Illinois act are fewer than in our own but we do not think it can fairly be said that in either case they render the act unduly discriminating or partial. Neither act is aimed against any individual or class of individuals, but against certain acts. If it were competent for the legislature to deal with the subject it was clearly competent for it to define the crime of desecration, and to specify the acts constituting the offense. Every use of the flag not included in such definition or specification would be impliedly excepted from the operation of the act, and it would seem wholly immaterial that the legislature saw fit to make some acts the subject of an express exception instead of narrowing the definition of the crime, or the specification of the acts constituting it, in such a way as to exclude the acts included in such exception. Besides there is nothing in the state or federal constitution which forbids the classification of subjects for legislation, so long as the classification is not arbitrary. Lancashier Ins. Co. *v.* Bush, 60 Nebr., 116, and cases cited. There this court held that the statute providing for the taxing of an attorney's fee against a defeated insurance com-
48 pany was valid legislation. See also Rosenbloom *v.* State, 6 Nebr., 344; State *v.* Montgomery, 45 Atl. (Me.), 13; *Ex parte* Thornton, 12 Fed., 538; Davis *v.* State, 51 Nebr., 302.

In this instance, the classification does not appear to be an arbitrary, but a most natural one. It is a matter of common knowledge that the use of the flag for advertising purposes offends the sensibilities of a large portion of our people. The statute is directed against the use of the flag for that purpose, but excepts from its provision certain uses to which the most sensitive could not object. Without such exception, either express or implied, the statute would be oppressive, if not absurd.

We come now to the remaining proposition on which the Illinois case rests, namely, that "the statute is an infringement upon the personal liberty guaranteed by the state and federal constitutions." The court in that case recognizes the right of the state, in the exercise of its police power, to enact such laws as are calculated to promote the health, comfort, safety and welfare of society, although such laws may operate as an infringement upon the personal liberty of the citizen, but holds that such laws must be in fact calculated to promote

those objects, or some of them, otherwise they are an arbitrary restraint on the citizen and unconstitutional. Such is the generally accepted doctrine. Lochner *v.* People, 25 Sup. Ct. Rep., 539, contains a discussion of the police power of the states, and an
49 examination of many cases bearing on the subject. After a somewhat lengthy discussion of the doctrine just referred to, the court in Ruhstrat *v.* People, *supra,* held that the statute was not calculated to promote any of the objects just enumerated and was therefore unconstitutional and void. Again we find ourselves unable to agree with a court to whose opinions, ordinarily, we attach great weight.

Patriotism has ever been regarded as the highest civic virtue, and whatever tends to foster that virtue certainly makes for the common good. That familiarity breeds contempt has the force of a maxim. That contempt or disrespect for an emblem begets a like state of mind toward that for which it stands, is a psychological law which underlies the canons against profanation which abound in every system of religious instruction. Such inhibitions against the irreverent use of sacred things are not mere arbitrary fulmination, but are grounded on sound practical considerations and the conviction that such use of the sacred emblems of religion is inimical to the cause of religion itself. The legislation under consideration may be justified on the same principle. The flag is the emblem of national authority. To the citizen it is an object of patriotic adoration, emblematic of all for which his country stands—her institutions, her achievements, her long roster of heroic dead, the story of her past, the promise of her future—and it is not fitting that it should
50 become associated in his mind with any thing less exalted nor that it should be put to any mean or ignoble use.

Moreover, that the citizen resents any improper use of the flag of his country, and that his resentment is frequently carried to the extent of a breach of the peace, are matters of common knowledge. The State has the undoubted right to legislate in the interests of the public peace. As was said in Udegraph *v.* Commonwealth, 11 Serg. & Rawl. (Pa.), 406, "An offense against the public peace may consist either of an actual breach of the peace, or doing that which tends to provoke or excite others to do it. Within the latter fall all acts and attempts to produce disorder, by written, printed or oral communications, for the purpose of generally weakening those religious and moral restraints, without the aid of which mere legislative provisions would prove ineffectual." The doctrine announced in that case seems peculiarly applicable to the case in hand, and to justify the act in question as a valid exercise of the police power of the state.

In McPike *v.* Van De Carr, *supra,* the act was not held wholly void, but only in so far as it applies to articles manufactured and in existence when the act went into effect. To that extent it was held unconstitutional as in contravention of the constitutional provision that no person shall be deprived of life, liberty or property without due process of law. If the statute is vulnerable to that ob-
51 jection, it would seem that a large number of our penal statutes, commonly regarded as valid, must fall by the same

rule. When our act against taking fish with a seine went into effect there were doubtless many seines manufactured and in existence; the same may be said of swivel guns, when the act making it unlawful to kill certain wild water fowl with such guns became a law. But to our knowledge it has never been seriously claimed that either of such acts is unconstitutional and void to the extent that it applies to "articles manufactured and in existence when the act went into effect." By sweeping prohibitory legislation, those engaged in the manufacture and sale of intoxicating liquors were put out of business in the state of Kansas, and property whose chief value consisted in its use in connection with the manufacture and sale of such liquors was rendered practically valueless. The validity of this legislation was assailed on the ground that it operated to deprive those engaged in the traffic in intoxicating liquors of their property without due process of law. Mungler *v. Kansas*, 123 U. S., 623. Considering that feature of the case, the court said: "Lawful state legislation, in the exercise of the police powers of the state, to prohibit the manufacture and sale within the state of spirituous, malt, vinous, fermented or other intoxicating liquors, to be used as a beverage, may be enforced against persons, who at the time happen to own property whose chief value consists in its fitness for such manufacturing purposes, without compensating them for the
52 diminution in its value resulting from such prohibitory enactments."

Nor does the fact that the flag was a part of the trade mark of the brewing company, place the defendants in any more favorable position. To the extent that the said trade mark is property, it comes within what has already been said. A patent or trade mark puts no restraint upon the state in the exercise of its police power, beyond the restraint imposed with respect to property generally. Patterson *v.* Kentucky, 97 U. S., 507.

We have gone over the act in the light of excellent briefs on either side and have reached the conclusion that it is not only a valid piece of legislation, but one well calculated to promote the common weal.

It is therfore recommended that the judgment of the district court be affirmed.

Duffie, C. and Jackson, C. concur.

By the COURT: For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

53 And afterward, to-wit, on the 28th day of November, there was filed in the office of the Clerk of said Supreme Court a certain Petition for Writ of Error, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

NICHOLAS V. HALTER and HARRY V. HAYWARD, Appellants,
v.
STATE OF NEBRASKA, Appellee.

Petition for Writ of Error.

To the Honorable Silas A. Holcomb, Chief Justice of the Supreme Court of the State of Nebraska:

The petitioners, Nicholas V. Halter and Harry V. Hayward, appellants, by their attorney, S. R. Rush, respectfully show that they are citizens of the United States of America and of the State of Nebraska; that on the 19th day of October, A. D. 1905, final judgment was rendered against them by the Supreme Court of the State of Nebraska, in a certain cause wherein Nicholas V. Halter and Harry V. Hayward were plaintiffs in error, and the State of Nebraska was defendant in error, affirming the sentences and judgment of the trial Court imposed upon your petitioners by said Court as will appear by reference to the record and proceedings in said cause filed herein; that said Supreme Court of the State of Nebraska is the highest Court of law or equity in said State of Nebraska, wherein it was adjudged that the provisions of Chapter 39, laws of 1903, in and for the State of Nebraska (Cobbey's Annotated
54 Statutes, Sections 2375G, *et seq.*) entitled "An Act to prevent and punish the desecration of the flag of the United States," which law made it a misdemeanor on and after July 9, 1903, for any person in said State to manufacture, sell or expose for sale, any article of merchandise on which should be placed a representation of the flag of the United States, and generally the use of the flag for advertising purposes, were not in conflict with the provisions of Section one (1) of the fourteenth amendment to the Federal Constitution, in that the provisions of said Act did not deprive certain citizens of the United States and of the State of Nebraska of rights, privileges and immunities secured to other citizens of the United States and of the State of Nebraska, nor of liberty or property without due process of law or the equal protection of the law, as appears by the record of the proceedings in said cause.

Wherefore, your petitioners pray for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Nebraska, and the Justice thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States, and the errors complained of by your petitioners may be examined and corrected and said judgment reversed and your petitioners discharged; and your petitioners will ever pray.

NICHOLAS V. HALTER,
HARRY V. HAYWARD,
By S. R. RUSH, *Their Attorney.*

55 Endorsed: 13955. Hayward, *et al., v.* State of Nebraska. Petition for Writ of Error. Supreme Court of Nebraska. Filed Nov. 28, 1905. H. C. Lindsay, Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Assignment of Errors in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

NICHOLAS V. HALTER and HARRY V. HAYWARD, Appellants,
v.
STATE OF NEBRASKA, Appellee.

Assignment of Errors on Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Nebraska.

Now come the said plaintiffs in error and respectfully submit that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Nebraska in the above entitled matter, there is manifest errors in this, to-wit:

1. The Court erred in holding that the provisions of Chapter 39, laws of the State of Nebraska for 1903, (Cobbey's Annotated Statutes, Sections 2375-G, *et seq.*) entitled "An Act to prevent and punish the desecration of the flag of the United States," were not in conflict with and in violation of the provisions of the fourteenth
56 amendment of the Constitution of the United States, for that the State of Nebraska, by and through the provisions of said Chapter 39, assumes and seeks (1) to deprive the plaintiffs in error and certain other citizens of the United States and of the State of Nebraska, of rights, privileges and immunities secured to every citizen of the United States and of the said State; (2) to deprive the plaintiffs in error and other citizens of the United States, of liberty and property without due process of law; (3) to deprive and to deny to the plaintiffs in error and certain other citizens and persons within the jurisdiction of the State of Nebraska, the equal protection of the law.

2. The Court erred in holding that by the provisions of said Act, the plaintiffs in error are not deprived of rights, privileges and immunities secured to other citizens of the United States and of the State of Nebraska, by the Federal Constitution and laws of the United States.

3. The Court erred in holding that by the provisions of said Act, the plaintiffs in error are not deprived of liberty and property without due process of law.

4. The Court erred in holding that the provisions of said Act do not deny to the plaintiffs in error the equal protection of the law.

5. The Court erred in holding that said Act and the authority exercised thereunder and thereby authorized to be exercised there-

under, is within the police power of the legislature of the State of Nebraska.

57 6. The Court erred in holding that the provisions of said Act making it unlawful for the plaintiffs in error to use, in a respectful way, a representation of the flag of the United States in their business for advertising the same, to be within the police power of the State.

7. The Court erred in holding the provisions of said Act denying the plaintiffs in error the right to use said flag in a respectful way, in their said business for advertising purposes, not to be an abridgement of the inalienable and statutory right of plaintiffs in error to pursue a lawful avocation in a lawful way without interference by the State.

8. The Court erred in holding that the provisions of said Act do not unlawfully discriminate between those persons engaged in manufacturing and selling articles of merchandise, and those engaged in publishing a newspaper, periodical, book, pamphlet, certificate or stationery, or those engaged in the manufacture and sale of jewelry.

9. The Court erred in holding that the provisions of said Act do not cast special burdens upon those engaged in manufacturing and selling general articles of merchandise, from which persons engaged in publishing newspapers, periodicals and printing stationery, and manufacturing and selling jewelry, are exempt.

10. The Court erred in holding that said Act does not grant special privileges to certain citizens which it denies to the plaintiffs in error and to other citizens of the State of Nebraska.

11. The Court erred in holding that the provisions of said Act are uniform in their operation throughout the State of

58 Nebraska upon all citizens of the State similarly situated.

12. The Court erred in holding that the provisions of said Act do not deprive the plaintiffs in error of the right to earn a livelihood in the pursuit of a lawful and harmless occupation.

13. The Court erred in holding that the United States does not have the exclusive power to regulate the use of the national flag.

14. The Court erred in holding that the use of the flag of the United States for advertising purposes in a lawful business and in a respectful way, offends the sensibilities of a large portion of our people.

15. The Court erred in holding that familiarity with the flag breeds contempt for it and that for which it stands.

16. The Court erred in holding that the use of the flag of the United States in a respectful way and in a lawful business, for advertising purposes, is an offense against the public peace.

17. The Court erred in ordering judgment to be entered affirming the judgment and sentences of the District Court in and for Douglas county, Nebraska.

18. The Court erred in ordering judgment to be entered and in entering judgment directing the District Court of Douglas county, Nebraska, to execute and inflict the sentences and judgment therein imposed upon plaintiffs in error.

S. R. RUSH,
Attorney for Plaintiff in Error.

59 Endorsed: 13955. Halter, *et al. v.* State of Nebraska. Assignment of Errors. Supreme Court of Nebraska. Filed Nov. 28 1905. H. C. Lindsay, Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Writ of Error, which said original Writ of Error is hereto attached, and is in the words and figures following, to-wit:

60 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Nebraska, Greeting:

Because of the record and proceedings, as also in the rendition of the judgment and sentences, of a cause which is in the said Supreme Court of the State of Nebraska, before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in said suit between Nicholas V. Halter and Harry V. Hayward, plaintiffs in error, and the State of Nebraska, defendant in error, wherein was drawn in question the validity of a statute of, and an authority exercised under, the said State, on the ground of their being repugnant to the constitution and laws of the United States, and the decision was in favor of such, their validity; and wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the Constitution, to-wit, the fourteenth amendment, a manifest error hath happened, to the great damage of the said Nicholas V. Halter and Harry V. Hayward, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the

61 record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 28 day of December 1905, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Hon. Melville W. Fuller, Chief Justice of the said Supreme Court, the 28th day of November, in the year of our Lord one thousand nine hundred and five.

[Seal United States Circuit Court, District of Nebraska.]

GEO H. THUMMEL,
Clerk of the Circuit Court of the United States
for the District of Nebraska,
By JOHN NICHOLSON, *Deputy.*

Writ of error allowed upon the execution of a bond by the said Nicholas V. Halter and Harry V. Hayward, complainants in error, in the sum of Five hundred ($500) Dollars, said bond when approved to act as a supersedeas.

Dated this 28th day of Nov'b'r, 1905.

SILAS A. HOLCOMB,
Chief Justice of the Supreme Court of the State of Nebraska.

[Endorsed:] 13955 Halter *et al vs.* State of Nebraska Writ of Error Supreme Court of Nebraska Filed Nov. 28 1905 H. C. Lindsay Clerk.

STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that this is the original Writ of Error filed in my office on the 28th day of November, A. D., 1905.

Witness my hand and the Seal of said Supreme Court this 15th day of December, A. D., 1905.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of Nebraska.

62 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Bond in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

NICHOLAS V. HALTER and HARRY V. HAYWARD, Appellants,
v.
STATE OF NEBRASKA, Appellee.

Bond.

Know all men by these presents, that we, Nicholas V. Halter and Harry V. Hayward, as principals, and Walter Moise, as surety are held and firmly bound unto the State of Nebraska in the full and just sum of Five Hundred ($500.00) Dollars, to be paid to the State of Nebraska, to which payment well and truly to be made we bind ourselves and our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 28th day of November, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at the September term, A. D., 1905, of the Supreme Court of the State of Nebraska, in a suit pending in said Court between the said Nicholas V. Halter and Harry V. Hayward, as plaintiffs in error, and the State of Nebraska, defendant in error, a judgment affirming the judgment and sentences of the District

Court for Douglas County, Nebraska, was rendered against
63 the said Nicholas V. Halter and Harry V. Hayward, and the said Nicholas V. Halter and Harry V. Hayward have obtained a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Nebraska, to reverse the judgment and sentences in the aforesaid suit, and a citation directed to the said State of Nebraska, citing and admonishing the said State of Nebraska to be and appear in the United States Supreme Court at Washington, District of Columbia, thirty days from and after the date of said citation, which citation has been duly served.

Now, the conditon of the above obligation is such that if the said Nicholas V. Halter and Harry V. Hayward shall appear, either in person or by attorney, in the United States Supreme Court at Washington, District of Columbia, on such date or dates as may be appointed for the hearing of said cause in said Court, and prosecute their said writ of error, and shall abide by and obey all orders made by the United States Supreme Court in said cause, and shall surrender themselves in execution of the judgment and sentences appealed from, as said Court may direct if the judgment and sentences against them shall be affirmed; and if they shall appear for trial in the District Court of Douglas county, Nebraska, on such day or date as may be appointed for a retrial by said Court, and abide by and obey all orders made by said Court, provided the judgment and sentences against them shall be reversed by the Supreme Court of the United States, *and abide by and obey*
64 *all orders made by said Court, provided the judgment and sentences against them shall be reversed by the Supreme Court of the United States*, then the above obligation to be void, otherwise to remain in full force and effect.

NICHOLAS V. HALTER,
HARRY V. HAYWARD,
Principals.
WALTER MOISE, *Surety.*

STATE OF NEBRASKA, *County of Douglas, ss:*

On this 28th day of November, 1905, before me personally appeared Nicholas V. Halter and Harry V. Hayward, to me known to be the persons described in and who executed the foregoing bond, and acknowledged that they executed the same as their free act and deed.

Witness my hand and seal the date aforesaid.

[SEAL.] E. W. STOLTENBERG,
Notary Public.

STATE OF NEBRASKA, *County of Douglas, ss:*

On this 28th day of November, 1905, personally appeared before me Walter Moise personally known to me to be the persons described in and who executed the foregoing bond as surety, and acknowledged that he executed the same as his free act and deed; and who being duly sworn deposes and says that he is the owner

in fee simple of real estate free of all exemptions and encumbrances, in the State of Nebraska, and that same is worth over
65 two thousand ($2000.00) Dollars.

Witness my hand and seal the date aforesaid.

[SEAL.] E. W. STOLTENBERG,
Notary Public.

The within bond and surety thereon approved by me this 28th day of November, 1905.

SILAS A. HOLCOMB,
Chief Justice of the Supreme Court of the State of Nebraska.

Endorsed: 13955. Halter, *et al. v.* State of Nebraska. Bond and Approval. Supreme Court of Nebraska. Filed Nov 28 1905. H. C. Lindsay, Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Citation in the words and figures following, which said original Citation with acceptance of service thereon by Norris Brown, Attorney General is hereto attached;

66 UNITED STATES OF AMERICA, *ss:*

To the State of Nebraska, Greeting:

You are hereby notified and admonished to be and appear at a Supreme Court of the United States at Washington, District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Nebraska, wherein Nicholas V. Halter and Harry V. Hayward are plaintiffs in error and the said State of Nebraska is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 28th day of November, in the year of our Lord one thousand nine hundred and five.

[Seal Supreme Court of Nebraska.]

SILAS A. HOLCOMB,
Chief Justice of the Supreme Court of the State of Nebraska.

Attest:
H. C. LINDSAY,
Clerk Supreme Court.

Copy of the within citation received this 4th day of December, 1905, at the office of the Attorney-General of the State of Nebraska.

MORRIS BROWN,
Attorney General.

Supreme Court of Nebraska Filed Dec. 4, 1905.
H. C. LINDSAY, *Clerk.*

STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that this is the original citation filed in my office on the 28th day of November, A. D. 1905.

Witness my hand and the Seal of said Court this 15th day of December, A. D., 1905.

H. C. LINDSAY,
Clerk of the Supreme Court of Nebraska.

[Endorsed:] 13955 Halter *et al. v.* State of Nebraska Citation Supreme Court of Nebraska Filed Nov 28 1905 H. C. Lindsay, Clerk.

67 STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that the foregoing is a true and correct transcript of the record and opinion of the Court and final judgment in a case in said Court wherein Nicholas V. Halter and Harry V. Hayward are plaintiffs in error, and The State of Nebraska, is defendant in error, as fully as the same is of record and on file in my office.

I further certify that the annexed petition for writ of error, assignments of error, and allowance and bond are true and correct copies of the originals which were lodged in my office, together with a copy of the original writ of error, for the defendant in error, the State of Nebraska, all of which said original papers were filed in my office on the 28th day of November, A. D. 1905. That the original writ of error and the original citation were duly filed in my office on said 28th day of November, A. D., 1905, and are hereto attached, copies of which said original papers are retained in my office, and the whole as set forth above is now returned in obedience to said writ of error. And I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

Witness my hand and seal of the Supreme Court of the State of Nebraska, this 15 day of December, A. D. 1905.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of Nebraska.

Endorsed on cover: File No. 20,026. Nebraska supreme court. Term No. 174. Nicholas V. Halter and Harry V. Hayward, plaintiffs in error, *vs.* The State of Nebraska. Filed December 28th, 1905. File No. 20,026.

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 174.

Office Supreme Court, U. S.
FILED.
JAN 14 1907
JAMES H. McKENNEY,
CLERK.

NICHOLAS V. HALTER AND HARRY V. HAYWARD,
Plaintiffs in Error.
vs.
THE STATE OF NEBRASKA.

In Error to the Supreme Court of the State of Nebraska.

BRIEF FOR PLAINTIFFS IN ERROR.

SYLVESTER R. RUSH,
Attorney for Plaintiffs in Error.

RABER, PRINTER, OMAHA.



Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 174.

NICHOLAS V. HALTER AND HARRY V. HAYWARD,
Plaintiffs in Error.
vs.
THE STATE OF NEBRASKA.

In Error to the Supreme Court of the State of Nebraska.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of Fact.

The plaintiffs in error were arrested, prosecuted and convicted in the District Court of Douglas County, Nebraska, on an information filed against them charging a violation of an Act of the Legislature of the State of Nebraska, approved July 4th, 1903, and entitled "An act to prevent and punish the desecration of the flag of the United States, Compiled Statutes of Nebraska, page 1992, Sections 7975-6-7. (Chap. 139 Laws

of 1903, Cobbey's Annotated Statutes 2375g, et seq.) That Act provides:

> Any person who in any manner, for exhibition or display shall place, or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color, or ensign, of the United States of America, or shall expose or cause to be exposed to public view any such flag, standard, color, or ensign, upon which shall be printed, painted or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article or substance, being an article of merchandise, or a receptacle of merchandise, upon which shall have been printed, painted attached or otherwise placed, a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article, or substance on which so placed, or who shall publicly mutilate, deface, defile, or defy, trample upon or cast contempt, either by words, or act, upon any such flag, standard, color or ensign, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars, or by imprisonment for not more than thirty days, or both in the discretion of the court.
>
> The words flag, color, ensign, as used in this

act shall include any flag, standard, ensign, or any picture or representation, or either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of said flag, standard, color or ensign, of the United States of America, or a picture, or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, color, or ensign, of the United States of America.

This act shall not apply to any act permitted by the statutes of the United States of America, or by the United States Army and Navy regulations, nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornimental picture, article of jewelry, or stationary for use in correspondence, on any of which shall be printed, painted or placed, said flag, disconnected from any advertisement.

The information charged that Nicholas V. Halter and Harry V. Hayward, plaintiffs in error, on the 28th of December, 1903, in the County of Douglas, and the State of Nebraska,

Did then and there unlawfully expose to public view, sell, expose for sale, and have in their possession for sale, an article, to-wit: a bottle of beer, being an article of merchandise, upon which said bottle of beer was attached and

placed a label, upon which was printed and painted a representation of the flag of the United States of America to advertise, call attention, to decorate, mark and distinguish the said article, namely, said bottle of beer, on which the said label containing said representation of the flag of the United States of America, was so placed, contrary to the statute, etc. (Printed Record, page 3.)

The plaintiffs in error were each sentenced to pay a fine of $50.00 and costs. (Printed Record, page 10.)

Upon the trial of this case in the State Court, there was no contest as to the facts. It was conceded that the plaintiffs in error, citizens of the United States, were engaged under the laws of Nebraska, in the business of retail liquor dealers; that their only offense consisted in selling and offering for sale, and having in their possession for sale, an article of merchandise, to-wit, malt liquor put up in bottles, marked by a label on each of which was printed and painted a representation of the flag of the United States, to-wit; the trade label of the Willow Springs Brewing Company, exhibits 1, 2, 3. (Printed Record pages 17-18-19,) and after so stating the case to the jury, the trial court instructed the jury as follows:

You are instructed that if you find from the evidence, beyond a reasonable doubt the defendants did on the 28th day of December, in the year of our Lord Nineteen Hundred and Three, the said defendants, being then and there in the County of Douglas, and State of Nebraska, did then and there expose to public view, sell, expose for sale, and have in their possession for

sale, a bottle of beer, being an article of merchandise, upon which said bottle of beer was attached and placed a label upon which was printed and painted a representation of the flag of the United States of America, to advertise, call attention to, decorate, mark and distinguish the said article, namely said bottle of beer, on which the said label containing said representation of the flag of the United States of America was so placed; then and in that case you should return a verdict of guilty in manner and form as charged in the information. (Printed Record page 5).

That at the trial prior to the giving of said instruction, and before any testimony whatever was introduced, the following objections were made on behalf of plaintiffs in error, (Printed Record pages 14 and 15:)

Comes now the defendants and each of them and demur and object to the introduction of any testimony or evidence in this case whatever, for the following reasons:

The law upon which this complaint is based is in violation of the Constitution of the State of Nebraska and of the United States and particularly of Section One of Article Fourteen of the amendments to the Constitution of the United States, and is null and void.

The defendants further object to the introduction of any testimony or evidence whatever in this case for the reason that the law upon which this complaint is based infringes upon the personal liberty, guaranteed to the defendants by both the Constitution of the United States and

the Constitution of the State of Nebraska, and also deprives the defendants as citizens of the United States of the right to exercise the privilege impliedly, if not expressly, guaranteed to them by the Federal Constitution and the laws of the United States.

The defendants further object to the introduction of any testimony whatever under this complaint for the reason that the law upon which this complaint is based permits the use of the National flag for publishers, newspapers, periodicals, books, ornamental pictures and also on articles of jewelry, but forbids its use, under penalty, for advertising purposes generally, thus discriminating in favor of one class of occupations, and against all others and is therefore class legislation, and null and void.

These objections were overruled by the trial court, to which rulings each of the plaintiffs in error duly excepted. (Printed Record, page 15.)

For the same reasons as set forth in the above objections, the plaintiffs in error, and each of them, moved the court to instruct the jury to return a verdict for the plaintiffs in error, and later on, upon the same grounds, the trial court was asked to give the plaintiffs in error a new trial. (Printed Record, pages 7-8-9.)

The same Federal questions were presented to the Supreme Court of the State of Nebraska, in the petition in error for plaintiffs in error herein. (Printed Record pages 1-2.)

The Supreme Court of Nebraska, on the 19th day of October, 1905, (Printed Record page 21) affirmed

the said sentence, and judgment of the said district court, solely upon the ground that the law on which this prosecution is based is not repugnant to the Constitution of the United States, and therefore valid; that the opinion of said court was duly filed of record, (Printed Record page 21) as required by the laws of the State of Nebraska, Compiled Stat. Neb. pg. 679. Sec. 2699. From that judgment the present writ of error from this court to the Supreme Court of Nebraska is taken.

Assignment of Errors.

Now comes the said plaintiffs in error and respectfully submit that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Nebraska in the above entitled matter, there is manifest errors in this, to-wit:

1. The Court erred in holding that the provisions of Chapter 39, laws of the State of Nebraska for 1903, (Cobbey's Annotated Statutes, Sections 2375g, et seq.) entitled "An Act to prevent and punish the desecration of the flag of the United States", were not in conflict with or in violation of the provisions of the fourteenth amendment of the Constitution of the United States, for that the State of Nebraska, by and through the provisions of said Chapter 39, assumes and seeks (1) to deprive the plaintiffs in error and certain other citizens of the United States and of the State of Nebraska, of rights, privileges and immunities secured to every citizen of the United States and of the said State; (2) to deprive the plaintiffs in error and other citizens of the United States, of liberty and property without due process of law; (3) to deprive and to deny to the plain-

tiffs in error and certain other citizens and persons within the jurisdiction of the State of Nebraska, the equal protection of the law.

2. The Court erred in holding that by the provisions of said Act, the plaintiffs in error are not deprived of rights, privileges and immunities secured to other citizens of the United States and of the State of Nebraska, by the Federal Constitution and laws of the United States.

3. The Court erred in holding that by the provisions of said Act, the plaintiffs in error are not deprived of liberty and property without due process of law.

4. The Court erred in holding that the provisions of said Act do not deny to the plaintiffs in error the equal protection of the law.

5. The Court erred in holding that said Act and the authority exercised thereunder and thereby authorized to be exercised thereunder, is within the police power of the Legislature of the State of Nebraska.

6. The Court erred in holding that the provisions of said Act making it unlawful for the plaintiffs in error to use, in a respectful way, a representation of the flag of the United States in their business for advertising the same, to be within the police power of the State.

7. The Court erred in holding the provisions of said Act denying the plaintiffs in error the right to use said flag in a respectful way, in their said business for advertising purposes, not to be an abridgment of the inalinenable and statutory right of plaintiffs in error to pursue a lawful avocation in a lawful way without interference by the State.

8. The Court erred in holding that the provisions of said act do not unlawfully discriminate between those persons engaged in manufacturing and selling articles of mecrhandise, and those engaged in publishing a newspaper, periodical, book, pamphlet, certificate or stationery, or those engaged in the manufacture and sale of jewelry.

9. The Court erred in holding that the provisions of said Act do not cast special burdens upon those engaged in manufacturing and selling general articles of merchandise, from which persons engaged in publishing newspapers, periodicals and printing stationery, and manufacturing and selling jewelry, are exempt.

10. The Court erred in holding that said Act does not grant special privileges to certain citizens which it denies to the plaintiffs in error and to other citizens of the State of Nebraska.

11. The Court erred in holding that the provisions of said Act are uniform in their operation throughout the State of Nebraska upon all citizens of the State similarly situated.

12. The Court erred in holding that the provisions of said Act do not deprive the plaintiffs in error of the right to earn a livelihood in the pursuit of a lawful and harmless occupation.

13. The Court erred in holding that the United States does not have the exclusive power to regulate the use of the national flag.

14. The Court erred in holding that the use of the flag of the United States for advertising purposes in a lawful business and in a respectful way, offends the sensibilities of a large portion of our people.

15. The Court erred in holding that familiarity with the flag breeds contempt for it and that for which it stands.

16. The Court erred in holding that the use of the flag of the United States in a respectful way and in a lawful business, for advertising purposes, is an offense against the public peace.

17. The Court erred in ordering judgment to be entered affirming the judgment and sentences of the District Court in and for Douglas County, Nebraska.

18. The Court erred in ordering judgment to be entered and in entering judgment directing the District Court of Douglas County, Nebraska, to execute and inflict the sentences and judgment therein imposed upon plaintiffs in error. (Printed Record pages 28 29).

ARGUMENT.

I.

Analysis of the Statute on which the Prosecution is Founded.

By the provisions of the foregoing Act of the Legislature of Nebraska, four separate things are declared a misdemeanor and prohibited, under penalty of fine or imprisonment, or both, as follows:

First. The placing, or causing to be placed, on the United States flag any word, figure, mark, picture, design, drawing or any advertisement.

Second. Exposing, or causing to be exposed to public view, the flag, on which shall be printed or attached thereto, in any manner whatever, any of the things above specified.

Third. Exposing to public view, manufacturing,

selling, exposing for sale, giving away or having in possession, for sale or giving away, or for use for any purpose whatever, any merchandise or receptacle therefor, upon which shall be printed, painted, attached or otherwise placed thereon, a representation of the flag to advertise or distinguish the article or substance upon which it is so placed.

Fourth. To publicly mutilate, deface, defile or defy, trample upon, or cast contempt on the flag by word or act.

By express provision the publisher of a newspaper, periodicals, books or stationery, also jewelers are permitted to use a picture, cut, printing or engraving of the flag in their business, or on their merchandise.

The plaintiffs in error are not charged in the information with having done any of the things specified in divisions No. 1, 2 and 4, and there is no pretense that they have desecrated the United States flag by mutilation, or casting contempt thereon by word or act; but they are charged with having done the things prohibited under the third division. In other words, they used the flag in their business instead of carrying it at the head of a street procession, by exposing for sale packages of malt liquor, having placed thereon a label, containing a respectful picture of the flag, and that is the thing that is seriously made a crime by the legislature of this State. It is this part of the law that we contend, is a most unwarranted invasion by the Legislature of the rights and personal liberties guaranteed citizens of the United States by the Federal Constitution.

The several parts of this statute, as above specified, are separate and distinct, and a defendant may

be charged under any one, separate and apart from the others. Therefore, for the Court to determine and declare unconstitutional that part of the law under which the plaintiffs in error were convicted, it is not necessary that the entire Act must be found unconstitutional. Such was the ruling of the Supreme Court of New York on a similar statute in the case of *People, ex rel., McPike v. Van De Carr*, 91 N. Y., Sup. Ct. Rep. 20, 26, affirmed by the Appelate Court, 178 N., Y. 425, 429. The Supreme Court held as follows:

> That which is constitutional may stand, while that which is unconstitutional will be condemned. (*Pollock v. Farmers' Loan & Trust Co.*, 158 U. S., 601). *In the Virginia coupon cases* (114 U. S., 269) Judge Matthews said: 'It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional and another be declared inoperative and void, because unconstitutional; but there are cases where the parts are so distinctly separable that each can stand alone, and where the Court is able to see, and to declare that the intention of the Legislature was that the part pronounced valid should be enforcible even though the other part should fail.'

II.

The Flag is the Emblem of National Sovereignty and the property of the people of the United States, under the laws and Constitution of the United States.

Under the first, second and thirteenth assignments of error, we contend that the flag used by the plintiffs

in error in their business is not a State emblem, and has never received the attention of the State Legislature until the Act in question was passed July 9, 1903. And it will further be observed that the State of Nebraska has never by law adopted a flag of its own. The flag under consideration is, therefore, solely a creation of the Federal law, and this or no other State has a right to prescribe the use that may be made of it by citizens of the United States. Congress, as early as 1794, enacted Sections 1791 and 1792 of the Revised Statutes of the United States as follows:

> (Section 1791). The flag of the United States shall be thirteen horizontal stripes, alternate red and white; and the union of the flag shall be thirty-seven stars, white in a blue field.
>
> (Section 1792.) On the admission of a new State into the union, one star shall be added to the union of the flag; and such addition shall take effect on the Fourth day of July then next succeeding such admission. Fed. Stat. Ann. Vol. 3, p. 115.

The Constitution of the United States does not provide for, and Congress has never enacted any law regulating the use of the flag; hence to determine the inherent and inalienable rights of the people under the Constitution and laws of the United States to use the flag, reference must be had to the law as declared by the courts of the United States and the several states. It is said in the case of the *Collector v. Day*, 11 Wall., 113: 20 L. ed. 126, that—

> The general government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties,

> acting separately and independently of each other within their respective spheres. The former, in its appropriate sphere, is supreme; but these states within the limits of their powers, not granted, or in the language of the Tenth Amendment, 'reserved,' are as independent of the General Government as that government, within its sphere, is independent of the states.

The Supreme Court of Illinois, in passing upon the constitutionality of a statute like the one under consideration, *Ruhstrat v. The People*, 185 Ill., 133, 145, declared:

> The flag is the flag of the United States as a sovereignty. The United States, acting through its Congress, has adopted a flag emblematic of national sovereignty. Presumably, the national flag was adopted for the use of the citizens of the United States. There is a difference between the privileges and immunities belonging to the citizens of United State as such, and those belonging to the citizens of each State as such. The privileges and immunities of citizens of the United States are those, which arise out of the nature and essential character of the national government, the provisions of its Constitution, or its laws and treaties made in pursurance thereof; and it is these rights which are placed under the protection of Congress by the Fourteenth Amendment. *People ex rel., Akin v. Loeffler*, 175 Ill., 585, 51 N. E., 785; Slaughter House cases, 16 Wall, 36; 21 L. Ed., 394. The right to use or display the flag would seem to be a privilege of a citizen of the United States, rather than the privilege of a citizen of any one of the states.

> The national government, in the exercise of its inherent power to establish a flag or emblem symbolic of national sovereignty, has passed (Secs. 1791 and 1792 of the Revised Statutes above referred to) and has thereby taken jurisdiction of the subject matter of a national flag, and has legislated upon it. Congress has passed no legislation restricting the use of the flag, or confining its use to any particular purpose. It would seem that, if it had been the intention of Congress to restrict or confine such use, some provision to that effect would have been embodied in the Act prescribing and describing the national flag.

Can it be said that by reason of the silence of the Federal Statute on the use of the flag, State legislation is thereby permitted on that subject? In the case of *Prigg v. Pennsylvania*, 16 Pet., 539, 618, 10 L. ed., 1060, quoted with approval in *Easton v. Iowa*, 188 U. S., 236, 237, 47 L. ed., 459, this court declares:

> If Congress have a constutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter.' Its silence as to what it does not do is

as expressive of what its intention is as the direct provisions made by it.

In the case of *Easton v. Iowa*, above cited, involving the validity of a state law regulating National Banks within the state of Iowa, the Supreme Court of that state said:

> The Acts of Congress provide no penalty for the fraudulent receiving of deposits, and the statute under consideration operates upon the person who commits the crime. And it is not a material question to determine whether it will be necessary to investigate the financial condition of the bank to prove that the bank was insolvent when the deposit was received. This statute is in the nature of a police regulation, having for its object the protection of the public from the fraudulent acts of bank officers. The mere fact that in violating the law of the state the defendant performed an act pertaining to his duty as an officer of the bank does not in any manner interfere with the proper discharge of any duty he owes to any power, state or Federal. Surely it was not intended by any act of Congress that officers of a national bank should be clothed with the power to cheat and defraud its patrons.

This court in the same case, after quoting the above language, said:

> We think that this view of the subject is not based on a correct conception of the Federal legislation creating and regulating national banks. That legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are

concerned of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states.

The United States courts have generally held that where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, is repugnant to such freedom.

Robbins v. Shelby County Taxing Dist. (1887) 120 U. S., 493, *reversing* (1884) 13 Lea (Tenn.) 303. See also *Western Union Tel. Co. v. James*, (1896) 162 U. S., 655; *U. S. v. E. C. Knight Co.*, (1895) 156 U. S., 11; *Pittsburg, etc. Coal Co. v. Bates*, (1895) 156 U. S., 588; *In re* Rahrer, (1891) 140 U. S., 555, *reversing* (1890) 43 Fed. Rep., 556; *Leisy v. Hardin*, (1890) 135 U. S.; 110, *reversing* (1889) 78 Iowa, 286; *Philadelphia, etc. Steamship Co. v. Pennsylvania*, (1887) 122 U. S. ,336; *Walling v. Michigan*, (1886) 116 U. S., 455; *Escanaba, etc. Transp. Co. v. Chicago*, (1882) 107 U. S., 687, *affirming* (1882) 12 Fed. Rep., 777; *Welton v. Missouri*, (1875) 91 U. S., 282, *reversing* (1874) 55 Mo., 288; *Rhea v. Newport News, etc. R. Co.*, (1892) 50 Fed. Rep., 22; *Pacific Coast Steam Ship Co. v. Railroad Com'rs*, (1883) 18 Fed. Rep., 11; *The Barque Chusan*, (1843) 2 Story (U. S.) 455, 5 Fed. Cas. No. 2,717; *Southern Express Co. v. Goldberg*, (1903) 101 Va., 621.

Nothing which is a direct burden upon interstate commerce can be imposed by the state with-

out the assent of Congress, and the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free. *Brennan v. Titusville*, (1894) 153 U. S., 302.

When it is manifest that Congress intends to leave that commerce, which is subject to its jurisdiction, free and unfettered by any positive regulations, such intention would be contravened by state laws operating as regulations of commerce as much as though these had been expressly forbidden. In such cases, the existence of the power to regulate commerce in Congress has been construed to be not only paramount, but exclusive, so as to withdraw the subject as the basis of legislation altogether from the states. *Smith v. Alabama*, (1888) 124 U. S., 473.

The cases above cited, and the law there announced applies with equal force to this one.

The sovereignty of the nation rests upon every foot of soil within its limits. The flag, the emblem of that sovereignty is co-extensive with such sovereignty, and is intended to be used and displayed by the government and its people freely throughout the several states and upon the high seas without let or hinderance by any state. If the several states can at will prescribe the uses of the national emblem, which the Federal government has intentionally left free from restriction in its uses, and such uses as broad as the field of trade and commerce, then the states may impose any restriction whatever. If the merchant can be lawfully prohibited from using a cut of the flag on his goods and wares,

then he may with as much propriety be prohibited from displaying the flag itself over the door of his place of business, or in the streets, to call attention to his business; and he might further be subject to the charge of advertising in displaying the flag at his residence. Masonic and fraternal orders, tradesmen, showmen, and in fact all civic orders of every character in their parades upon the streets of our cities might be prohibited the use of the flag, under the guise of advertising, or becoming too familiar with "Old Glory"; in fact such restrictions might be imposed under the specious guise that "familiarity breeds contempt" as would banish the flag from the states altogether. In the case of *Ruhstrat v. The People*, above cited, page 147 the court says:

> If the State legislature can restrict the use of the national flag, and permit its use for one purpose, and prohibit its use for another purpose, it would have the right to prohibit its use altogether within the limits of the state.

Jurisdiction and Control of the National Flag has Always Been in the Federal Government: It has Never Been Any Place Else.

The act of the Legislature of Nebraska herein complained of concedes in express terms the sovereign right of the Federal government to make such laws and regulations with respect to the flag as it shall deem proper. That provision is as follows:

> This act shall not apply to any act permitted by the statutes of the United States of America, or by the United States Army and Navy regulations. * * * * *

The Nebraska Legislature, fearing that Congress might not have either the wisdom or patriotism to enact proper laws with respect to the flag, stands in the attitude of assuming jurisdiction to legislate on that subject for patriotic purposes. In this connection it is only necessary to suggest that if this state has a right to enact such a law, then the United States has not; the jurisdiction is either in the national or state government; it cannot rest in both; there cannot be such a thing as a divided jurisdiction. *Re Heff*, 197 U. S., 488, 506, 49 L. ed., 848.

Federal and State laws to punish counterfeiting do not vary this rule: they occupy different planes. The federal law punishes a fraudulent act against the national government; the state law punishes a cheat and a fraud of one person or citizen upon another within its limits. This distinction is pointed out by this court in the case of *Fox v. State*, 5 How., U. S., 416, cited by the Nebraska Supreme Court to sustain its decision in this case, to the effect that an act punished by the federal and state government may be one and the same offense, and therefore a law may be passed by Congress to punish a desecration of the flag, and likewise the state of Nebraska may pass a valid law to punish the same act. In such a case it is evident that the state by such a law attempts to occupy the same plane that an act of Congress would occupy, and is therefore invalid, as in such instances the jurisdiction of Congress is exclusive. In the case *Re Heff*, id., this court further says:

> It is true the same act may often be a violation of both the state and Federal law, but it is only when those laws occupy different planes. Thus, a sale of liquor may be a violation of both

the state and Federal law, in that it was made by one who had not paid the revenue tax and received from the United States, a license to sell, and also had not complied with the state law in reference to the matter of state license. But in that case the two laws occupy different planes, one that of revenue and the other that of police regulation.

The history of the United States discloses that the executive department of the government has at all times exercised jurisdiction over this emblem of national sovereignty. Wherever the flag is planted by the conquering armies of the United States, the sovereignty of the nation follows, and such act of sovereignty is exclusive of the power of any state or foreign nation. *Jones v. United States*, 137 U. S. 202, 34 L. ed., 691. The executive, the strong arm of the government, further assumes jurisdiction to resent and punish insults to the flag, whether committed by foreign foe, or any state of the union, as an insult to the nationality for which it stands. So universally has this right been assumed and exercised by the Federal government the people in their capacity as citizens of a sovereign nation demand of the United States, and not the several states, such protection. And we apprehend that in all places where the flag is displayed by the sovereign power of the nation, the executive arm of the government has power to protect the flag in time of peace, as well as in time of war, even to the killing of the person or persons who might haul it down, should it become necessary to resort to such harsh means. *Cunningham v. Neagle*, 135 U. S., 1, 34 L. ed., 55. Yet if the foregoing act of the Nebraska Legislature were to be given full force and effect, any

officer of the army of the United States who should happen to sell or issue to enlisted men from the quartermasters's department, at a military post in Nebraska a package of goods, whether manufactured in this state, or shipped in from another state, having thereon a cut of the flag of the United States, would be subject to arrest and punishment under this law: and any display that any executive officer of the United States might make of the flag, even under the direction of the President, not authorized by the laws of the United States, or the rules and regulations of the army or navy and prohibited by this act of the Nebraska Legislature, would subject him to arrest.

The flag is one of the instrumentalities of the national government, in war and commerce, and has played an important part in maintaining and consolidating the several states of the union into a nationality. No one will deny but that Congress in the exercise of its powers under article 1, section 8 of the Constitution, to regulate commerce and maintain an army and navy, had a clear constitutional right to create the flag, the emblem of the nations sovereignty.

It will further be conceded by all that it is a subject entirely national in its character, and not only admits but requires uniform laws and regulations with respect thereto. By analogy, the rule applied to national subjects relating to foreign and interstate commerce requiring uniform laws, throws some light on this subject. The Federal courts have universally held that the power of Congress is exclusive where the matter is national in its character, or admits of one uniform system or plan of regulation, and is certainly so far exclusive that no state has power to make any

law or regulation which will affect the free and unrestrained intercourse and trade between the states as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other states coming or brought within its jurisdiction. Fed. Stat. Ann. Vol. 8, pg. 388. This court in the case of *Welton v. Missouri*, 91 U. S., 280, states the law on that subject as follows:

> Where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority.

The national character of the flag in the matter of trade and commerce is admirably portrayed in the case of *Ruhstrat v. the People*, 185 Ill., pg. 144, as follows:

> The flag is used, in the prosecution of commerce upon the high seas, as a symbol of nationality. The nationality of a ship is determined by the flag which it carries. A ship, navigating under the flag and pass of a foreign country, is to be considered as bearing the national character of the country under whose flag she sails. Under what is called, in international law, "the law of the flag", a ship-owner, who sends his vessel into a foreign port, gives notice by his flag to all who enter into contracts with the ship-master, that he intends the law of that flag to regulate those contracts, and that they must either submit to its operation or not contract with him or his agent at all. (1 Bouvier's Law Dic.—Rawle's Rev.—pp. 799, 800).
>
> It is a doctrine of international law that a ship

> becomes hostile so soon as she hoists the enemy's flag; and while the cargo of the ship does not necessarily take character from the flag, yet the general rule is that the goods under such flag follow the fate of the vessel. It is difficult to see why, if in the prosecution of foreign commerce or trade, the flag is used to protect a ship and cargo and designate the character, it should be a desecration of the same flag to use a likeness of it upon a label or trade-mark in the prosecution of domestic trade or business.

The importance attached by this court to the use of the national flag in connection with vessels and commerce on the high seas is disclosed in the case of *The Marianna Flora*, 11 Wheat., 1, 6 L. ed. 405. The Flora was a merchant vessel of Portugal and was mistaken for a pirate ship and fired upon by Lieut. Stockton in command of the armed schooner Alligator, a vessel belonging to the United States. This court, speaking through Justice Story refers to the flag as follows:

> And a piratical aggression by an armed vessel sailing under the regular flag of any nation may be justly submitted to the penalty of confiscation for such a gross breach of the law of nations. * * * * There is no pretense to say that he (Stockton) committed the first aggression. That, beyond all question, was on the part of the Marianna Flora, and her firing was persisted in after the Alligator had hoisted her national flag. It was then a case of open, mediated hostility, and this too without any national flag displayed by the Portugese ship, which might tend to correct the

> error, for she never hoisted her flag until the surrender. * * * He had the flag of his country to maintain, and the rights of his cruiser to vindicate.
>
> But it is argued that Lieut. Stockton was bound to have affirmed his national flag by an appropriate gun: * * * He, (commander of the Flora) not only did not hoist or affirm his flag in this first instance, but repeatedly fired on his adversary with hostile intentions, without exhibiting his own national character at all. * * * He, (Stockton) thought the aggression was piratical, and that it was an indignity to the national flag. It was a hostile act and indignity to the nation, and a trespass upon its rights and sovereignty.

The use of the flag has become so varied and manifold in trade and business, upon land and sea, by citizens of the United States, that we are led to the inquiry why permit the merchant upon the seas to advertise to the world by the use of the flag that his wares are the product of American genius and labor, or the master of a ship to advertise the same by carrying the national flag, assuring shippers he is under its protection, thereby securing trade and business, while commerce and trade upon the land and between the several states is carried on under the flag in the face of a drastic law like this. The merchant, tradesman or artisan who calls attention to his particular wares, trade or business by a respectful and patriotic use of the flag, is branded a criminal for so doing. The meddlesome injustice and unconstitutionality of such a law is so apparent that no court of last resort, save the

Nebraska Supreme Court, called upon to pass upon its constitutionality, has ever upheld it.

III.

The Act in Question is in Conflict With the Fourteenth Amendment to the Federal Constitution.

We contend that under the 1st, 2nd, 3rd, 4th, 7th, assignments of error, the Supreme Court of Nebraska erred in holding that said law is not in conflict with section one, article fourteen, of the amendments to the Constitution of the United States.

Section I, article XIV is as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunites of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

The prohibitions of this section of the Constitution of the United States, have reference to state action exclusively. *Virginia v. Rives*, 100 U. S., 318. And these prohibitions, as embodied in the provisions of section one of the constitution referred to, have reference to actions of the political body denominated a state, by whatever instruments, or in whatever modes that action may be taken. A state acts by its legislative,

by its executive, or by its judicial authorities. It can act in no other way. The constitutional provision therefore must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever by virtue of public position under a state government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. Ex p. Virginia. 100 U. S., 347, *Chicago, etc., R. Co. v. Chicago*, 166 U. S., 234, *Scott v. McNeal*, 154 U. S., 45; *Missouri v. Dockery*, 191 U. S., 170; *Huntington v. New York*, 118 Fed. Rep., 686; *Nashville etc., R. Co. v. Taylor*, 86 Fed. Rep., 184. And this inhibition reaches the legislative as well as the executive and judicial departments. The legislative authority cannot usurp the power to determine what is due process of law, and on the plea of public necessity ignore the well-established safe-guards which the law of the land has heretofore recognized and enforced. *Meyers v. Shields*, 61 Fed. Rep., 726; *Ho Ah Kow v. Nunan*, 5 Sawy., 552, 12 Fed. Cas. No. 6,546. And it is for the courts alone to determine what rights are protected under the above provision of the Constitution of the United States, as well as what rights are unconstitutionally infringed upon by state legislation.

The law and authorities on this subject are so forcibly presented in the case of *Ruhstrat v. People*, above cited, that we quote at length from the opinion of the Court, pages 138 to 141 inclusive, as follows:

> The expression 'life, liberty and the pursuit of happiness', is general in its character, and in-

cludes many rights which are inherent and inalienable. Many of the rights referred to in this expression are included in the general guaranty of 'liberty'. The happiness here referred to may consist in many things or depend on many circumstances, but it unquestionably includes the right of the citizen to follow his individual preference in the choice of an occupation. (Black Const. Law, Page 404.)

'The right of every man to choose his own occupation, profession or employment, though not expressly guaranteed by the Constitution, is included in the right to the pursuit of happiness.' Ibid., 411, 'In *Powell v. Pennsylvania*, 127 U. S., 678, 32 L. Ed. 253, 8 Sup. Ct. Rep. 992, 1257, the general proposition that the enjoyment by the citizens, upon terms of equality with all others in similar circumstances, of the privliege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is a general part of his rights of liberty and property as guaranteed by the Fourteenth Amendment, was assented to by the Supreme Court of the United States as embodying a sound principle of constitutional law. In the latter case it was also held that, although the power and discretion which a State Legislature has in the matter of promoting the general welfare, and of employing means to that end, are very large, yet such power must be so exercised as not to impair the fundamental rights of life, liberty and property. In *Algeyer v. Louisiana*, 165 U. S., 578, 41 L. Ed., 832, 17 Sup. Ct. Rep., 427, it was said: 'The right to follow any of the com-

mon occupations of life is an inalienable right. It was formulated as such in the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'All men were created equal, that they are endowed by their Creator with certain inalienable rights, and that among these are life, liberty and the pursuit of happiness'. This right is a large ingredient in the civil liberty of a citizen. It was also said in this case that 'the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States'. It was also there said: 'If it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers, which, as already intimated, is a material part of the liberty of the citizen'. *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.*, 111 U. S., 746, 28 L. Ed., 585, 4 Sup. Ct. Rep., 652, In *Braceville Coal Co. v. People*, 147 Ill., 66, 22 L. R. A., 340, 35 N. E., 62, we said (page 71, 147 Ill., page 342, 22 L. R. A., and page 63, 35 N. E.): 'Liberty', as that term is used in the Constitution, means, not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only

to the restraints necessary to secure the common wellfare.' *Frorer v. People*, use of School Fund, 141 Ill., 171, 16 L. R. A., 492, 31 N. E., 395; *Com. v. Perry*, 155 Mass., 117, 14 L. R. A., 325, 28 N. E., 1126. *People v. Gillson*, 109 N. Y., 389, 17 N. E., 343; *Live Stock Dealers' & Butchers' Ass'n v. Crescent City L. S. L. & S. H. Co.*, 1 Abb. U. S. 388, Fed. Cas. No. 3, 408; Slaughter House Cases, 16 Wall., 36, 21 L. Ed., 394; *Godcharles v. Wigeman*, 113 Pa. St., 431, 6 Atl., 354; *State v. Goodwill*, 33 W. Va., 179, 6 L. R. A., 621, 10 S. E., 285.

The plaintiff in error was engaged in the wholesale and retail cigar business. This was certainly a lawful and respectable business. Under the authorities referred to and under the interpretation of the Constitution there made, plaintiff in error had not only the right to choose the business in which he was engaged as his occupation, but he had the right to pursue and carry on that business in any way and by any methods which were lawful and proper. Included in 'the right to choose one's occupation is the right to be free from unlawful intereference or control in the conduct of it.' Black Const., Law, p. 412. In these days of commercial enterprise, advertising is an important factor in business pursuits. It cannot be denied that the plaintiff in error had a right to advertise his business in any legitimate manner, so as to attract the attenion of the public. Nor can it be denied that the plaintiff in error had the right to design and make use of a trademark. The use of trademarks is as old as commerce itself. The conventional trademark is a part of what is called 'the symbolism of commerce.'

Browne, Trademarks, 2d Ed., Sections 1, 26. It is allowed to use a picture as a trademark, and a picture made up of many objects in many colors may be a trademark. (Ibid,, 258, 259.) Browne, in his work on Trademarks (265) says: "Color may be of the essence of a mark of manufacture or commerce, known as a 'trademark.' National flags are sometimes blended with other objects to catch the eye. They are admirably adapted to all purposes of heraldic display, and their rich, glowing colors appeal to feelings of patriotism and win purchasers of the merchandise to which they are affixed. * * One flag printed in green may catch the eye of the son of the Emerald Isle. * * * Another flag, with the stars on a blue field, and stripes of alternative red and white, may secure a preference for the commodity upon which it is stamped." The right of the citizen to pursue the calling which he has chosen, and to advertise his business in a legitimate way by the use of labels or trademarks, is not improperly exercised by making a picture of the national flag a part of such labels or trademarks, unless thereby the public safety, welfare or comfort is interfered with.'

The same conclusions, by a somewhat different method of reasoning, were reached in the case of People *ex. rel., McPike v. Van DeCarr*, 91 N. Y., Sup. Ct. Rep., 20. The Supreme Court of the United States has in a measure defined what rights are guaranteed under the above amendment to the Constitution of the United States in (*Barbier v. Connolly*, 113 U. S., 27) as follows:

> "Undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; *that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances*; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.

The general objection that the act is unconstitutional as depriving citizens of the United States of the right of exercising a privilege impliedly, if not expressly granted to them by the Federal Constitution, is dismissed by the Nebraska Supreme Court with the observation that:

> The right to advertise whiskey, beer, tobacco and other articles of merchandise by the use of the national flag, is certainly not the subject of an express constitutional grant, and it can be said to be impliedly granted only in the sense that, like an infinite number of other acts, it is

> not prohibited. If the fact that an act or course of action is not prohibited by the Federal Constitution gives a citizen of the United States a right which the state is powerless to abridge or restrict, the sphere of state legislation is more circumscribed than has been generally supposed, and our criminal code is largely waste paper. A moments reflection would seem sufficient to show that the proposition is utterly unsound. (Printed record page 23.)

This opinion in effect announces the novel doctrine that the fourteenth amendment to the constitution protects no rights, privileges or immunities, of citizens of the United States, but those expressly enumerated and set forth; there being none expressly set forth, therefore these much quoted words of the constitution "No State shall make or enforce any laws which shall abridge the privileges or immunites of citizens of the United States", protect no rights, and are a mere nulity. This constitutional provision is a direct inhibition on the power of the several states of the union to pass laws abridging or unduly interfering with the rights of citizens of the United States, and the Federal government has wisely reserved the right to say what those rights are, and annul any law enacted by any state which interferes with the rights of her citizens, whenever such law transcends the well established and recognized police power of the state. In the case of *Lochner v. New York*, 198 U. S., 45, 56, this court has announced the rule that:

> It must of course be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the 14th Amend-

ment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family.

In construing the Constitution of the United States, that which is implied is as much a part of the instrument as that which is expressed. This principle, in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers—a difficulty which the instrument itself recognizes by conferring on Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly

granted and all other powers vested in the government or any branch of it by the Constitution. Ex. p., Yarbrough 110 U. S., 658, Legal Tender Cases, 12 Wall., (U. S.,) 535, *U. S. v. Marigold*, 9 How., (U. S.,) 568, *U. S. v. Morris*, 125, Fed. Rep., 324. In the case of *Hepburn v. Griswold*, 8 Wall., (U. S.) 613, this court announces that—

> It is generally, if not universally, conceded that the government of the United States is one of limited powers, and that no department possesses any authority not granted by the Constitution. It is not necessary, however, in order to prove the existence of a particular authority, to show a particular and express grant. The design of the Constitution was to establish a government competent to the direction and administration of the affairs of a great nation, and, at the same time, to mark, by sufficiently definite lines, the sphere of its operations. To this end it was needful only to make express grants of general powers, coupled with a further grant of such incidental and auxiliary powers as might be required for the exercise of the powers expressly granted. These powers are necessarily extensive. It has been found indeed, in the practical adminstration of the government, that a very large part, if not the largest part, of its functions have been performed in the exercise of powers thus implied.

The acts of individuals are presumed to be lawful until the contrary appears, and in this case the record is that the plaintiffs in error are lawfully engaged in the business of a retail liquor dealer and are, therefore,

entitled to the same consideration in a Court of justice as any business man or merchant; in other words, the law of this case must govern all persons alike within the limits of the State of Nebraska. That the plaintiffs in error have a perfect right, under the law, to choose this occupation, will be conceded, and having once chosen such occupation it follows as the night the day, they have "the right to be free from unlawful interference or control in the conduct of it". Black. Const. Law, p. 412.

IV.

The Police Power of the State Cannot be Consistently Invoked to Sustain Such a Law.

Again the Nebraska Supreme Court erred under assignments of error 5, 6, 14, 15, 16, 17 and 18 in holding that the act in question comes within the police power of the state. The provision of this act of the legislature as set forth in the foregoing third division, of the law, (Brief p. 10), under which the defendants are prosecuted, and on which this case must stand or fall, does not come within the test of the police power of the state as declared by the Supreme Court of Nebraska in *Smiley v. McDonald*, 42 Neb., 5 as follows:

> The Legislature cannot, uuder the guise of police regulation, arbitrarily invade private property or personal rights. The test, when such regulations are called in question, is whether they have some relation to the public health or public welfare, and whether such is, in fact, the end sought to be attained.

And later, in *C. B. & Q. R. R. Co. v. State*, 47 Neb., 549, the Court declares:

> The Legislature cannot, under the guise of police regulation, arbitrarily invade personal rights or private property. There must be some obvious and real connection between the actual provisions of such measures and their assumed purpose.

The doctrine here announced was affirmed on appeal in 170 U. S., 57.

Applying the test as herein announced, the question must be met and answered, how does a picture of the national flag on a bottle of beer, a box of cigars or any article of merchandise, effect, directly or indirectly, for better or worse, the public health or the public welfare, and was that the end to be accomplished by this law? The public health is certainly not impaired by such use of the flag; the public welfare, including the peace and good order of society, has been maintained in the United States for over a century without such a law, and when, only within the past few years, such a law, through false and mistaken ideas of patriotism, was enacted by the States of New York and Illinois, it was promptly declared unconstitutional by the Supreme and Appellate Courts, for the reason that to prohibit the respectful use of the flag for advertising purposes, like that with which the plaintiffs in error are charged does not lie within the police power of a State. The Supreme Court of New York, in the case of *People ex rel McPike v. Van De Carr*, 91 N. Y. Sup. Ct. Rep., 20, 27, declares that:

> It is elementary that to be within the police power the legislation must relate in some way to the public health, morals, safety, comfort or general welfare. It is not to be disputed that it

is for the Legislature generally to determine what laws and regulations are required to subserve either of such purposes, and that the exercise of legislative discretion in those respects is not the subject of judicial review, but, as was said in *People v. Gibson*, (109 N. Y., 389), 'a statute to be upheld as an exercise of the police power must have some relation to those ends; the rights of property may not be invaded under the guise of a police regulation * * * * when it is manifest such is not the object of the regulation.' The interdiction by the State of the use of a picture or representation of the American flag as a trademark, or upon trade labels, or in connection with an advertisement of merchandise, in no way relates to any one of the legitimate subjects to which the police power of the State extends. It is not to be assumed even that the decorous use of a representation of the flag for such purposes runs counter to a general public sentiment, or that the statute in this respect gives expression to a general public desire. The Government of the United States has not prohibited the use of the flag in connection with advertisements. Trade labels, of which a representation of the national ensign forms a part, are accepted at the patent office, as appears upon the face of one of the labels annexed to the complaint in this matter. Such trademarks and labels have been of common use. 'National flags are sometimes blended with other objects to catch the eye. They are admirably adapted to all purposes of heraldic display, and their rich

glowing colors appeal to feelings of patriotism, and win purchasers of the merchandise to which they are affixed. * * * One flag printed in green may catch the eye of a son of the Emerald Isle. * * * Another flag, with stars on a blue field and stripes of alternate red and white, may secure a preference for the commodity upon which it is stamped.' (Brown Trademarks [2d ed.] §265). There is nothing in the use of a representation of the American flag as a trademark, or in connection with a trademark or trade label that inspires the idea that the flag is degraded or belittled. On the contrary, the remark of Mr. Browne would seem to indicate the real situation namely, that their rich glowing colors appeal to feelings of patriotism.

Not relating to any legitimate exercise of police power, those provisions of the statute under consideration which make it a criminal offense to use the national standard in connection with a trademark or trade label or advertisement of merchandise, can not be regarded otherwise than as an unauthorized interference with the privilege and the liberty of the citizen; for liberty, as is well understood, includes the right to engage in any lawful pursuit not injurious to the community and subject only to the restraints necessary for the common welfare (*People v. Marx*, 99 N. Y., 386), and that includes the right to use all agencies customary and lawful in the prosecution of business; and it is not legitimate legislation to declare that one of those customary and lawful agencies shall be-

> come unlawful, unless its use in some way affects the public health, the public morals, the public peace, the public safety, the public welfare or the general comfort. Hence, we think as to this statute on the point now under consideration, it is obnoxious to the objection that it infringes upon the personal liberty of the citizen.

See also *Rushtrat v. People*, above cited page 143 to the same effect.

It is contended in this case, and sustained by the Supreme Court of Nebraska, that the act of the legislature in question is intended to foster patriotism, and it is in the interest of the State that her citizens should be patriotic, that they may all the better fight for their country and therefore such a law makes for the public welfare. A similar argument as to the health of the people was advanced in the case of *Lochner v. New York*, 198 U. S., 45, 60, involving the constitutionality of a statute of the State of New York, limiting employment of bakers to sixty hours a week, and ten hours a day. But this court overruled such contention declaring:

> It is also urged, pursuing the same line of argument, that it is to the interest of the State that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police

> power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employes, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, least the fighting strength of the State be impaired. We mention these extreme cases because the contention is extreme. We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employes named, is not within that power and is invalid.

With all due respect to the Supreme Court of Nebraska, we think the Court surely erred in holding that the familiar use of the flag on a label, or as a part of a trademark of a business man, is a desecration of the flag, or even tends to bring it into contempt or disrespect. In this view we are supported by the holding of the Illinois Supreme Court in the case of *Ruhstrat v. People*, above cited page 143 as follows:

> The use of a likeness of a flag upon a label, or as a part of a trademark of a business man in the lawful prosecution of his business, cannot be regarded otherwise than as an act which is harmless in itself. It may violate the ideas which some people have of sentiment and taste, but the propriety of an act, considered merely from the standpoint of sentiment and taste, is a

matter about which men of equal honesty and patriotism may differ."

In this contention we are further supported by the New York Supreme Court in the case of *People ex rel. McPike v. Van De Carr*, above cited page 28 as follows:

> There is nothing in the use of a representation of the American flag as a trademark, or in connectiod with a trademark, or trade label, that inspires the idea that that flag is degraded or belittled. On the contrary, the remark of Mr. Browne would seem to indicate the real situation namely, that their rich glowing colors appeal to feelings of patriotism.

The idea that the flag is disgraced by its use in trade is largely the result of a misapprehension as to the purposes for which the flag was created. War and commerce are the two subjects under the constitution which authorized Congress to create the flag. To the casual observer of sentimental tendencies, the necessity for and use of the flag begins and ends with war,—the emblem of the nation's martyred heroes. But to the statesman and the jurist the uses of the flag in time of peace are no less important, and occupy a much broader field. War is a necessary evil; trade and commerce are the life blood of the nation. It is in such commerce, foreign and interstate, that the flag is employed as a necessary instrumentality in carrying on the same. Upon all of the navigable rivers, lakes, bays, gulfs and inlets of the United States, and on the high seas of the world, the products of our factories and fields; the goods and wares of our merchants float in vessels to distant markets under the nation's flag. Is there any one so blinded by the blandishments of war who would

care to go on record as even expressing an opinion that this constant every day indiscriminate commercial use of the flag by the owners of every miserable craft brings it into contempt? If the goods and wares beneath the folds of the flag cast no discredit upon it, what is there about a cut or picture of the flag painted or printed on such goods that would make the average American citizen bow his head in shame. Surely such use of the flag offends no one, and does not come within the police power of the State to prohibit.

It is further sought to sustain the law in question in that it promotes or tends to promote the public peace, and is therefore a proper subject for police regulation by the state. If the use of the flag as charged against plaintiffs in error is an innocent, harmless use as set forth by the opinions of the courts above cited, then how can it offend against society, or provoke reasonable men to a breach of the peace. Every merchant and druggist, every liquor and cigar dealer in Nebraska, sells goods over his counter without any disturbance every day in the year, in open violation of this law, and if there was any merit or truth in the contention that such use of the flag in trade provokes breaches of the peace, the streets of our cities and towns would run red with blood. It is within the common knowledge of courts and laymen that such use of the flag appeals to patriotism as stated by Browne (Trademarks 265) and secures purchasers for the article on which it is stamped; on the contrary it never even occurs to sensible men to resent by word or act such use of the flag.

There is perhaps no emblem in the world around which so much sentiment and so many sacred recollections cluster as that of the cross, and while it is used for

advertising purposes more extensively, in the arts, trades and commerce than any other emblem, in connection with every conceivable thing, from a box of cough drops to an ambulance wagon; yet we hear no one complaining that the cross is being desecrated by such use, or that the Christian religion is thereby brought into contempt.

Again it may be said that the English people are the most patriotic people in the world; yet England has no law to prevent the use of her flag or coat of arms for advertising purposes, and when the Englishman in every commercial country on earth turns over his breakfast plate, he usually finds stamped on the bottom, the lion and the unicorn, or the colors of his country; but he is not incensed at this, or conscious of anything like a desecration of those time honored emblems by such advertisement. On the contrary he is proud that the goods and wares of his country bear the mark of her nationality, giving to them the prestige they deserve in the markets of the world. Why should the goods of American manufacture not enjoy the same advantage? Why should the nation not enjoy the advantage of the goods and wares of her commerce, bearing the symbol of her nationality? It is evident to the most casual observer that a commercial nation desiring to foster and maintain her commerce, has a deep interest in protecting her people, to the end that they shall not be deprived of whatever prestige may be derived in the markets of the world by stamping such goods, wares and merchandise with the insignia of their nationality. Instances of like character might be multiplied indefinitely, but these are sufficient to reveal the falsity of the logic by which the flag law is sought to be main-

tained, as well as the folly of the same when viewed in its practical operations.

In Law Notes, Volume 10, No. 4, page 67, there appears an article reviewing the flag laws of the several states heretofore referred to, and further declaring:

> Before discussing the validity of statutes forbiding the use of the flag for advertising purposes, it may be well to say a word as to the expediency of such use. In this connection, the idea naturally suggests itself that the statutes are useless, or, at least, unnecessary. The statutes are justifiable only if the use offends the sensibilities of a majority of the people; if it does offend their sensibilities, then the advertiser defeats his own end, by repelling instead of attracting possible buyers. * * *
> It would seem therefore, that a State statute prohibiting the use of the national flag for advertising purposes may be properly held unconstitutional on the ground that it interferes with the personal and property rights of the citizen, and promotes a mere aesthetic object, and therefore is not within the police power.

Another line of decisions illustrating the principles contended for will be found in the construction of the recent acts of the Legislatures of the several States throughout the country, prohibiting the use of trading stamps; such laws have been declared unconstitutional by the Courts of last resort. The case of *Young v. Commonwealth*, 101 Va., 859, 45 S. E. Rep., 327, was brought to test the constitutionality of the Virginia Act passed in 1898. In disposing of the question the Court reviews at length the recent cases upon the sub-

ject, and bases its opinion mainly upon the Rhode Island case of *State v. Dalton*, 22 R. I., 79, 46 Atl., Rep., 234. That Court holds that the Act under consideration, which was very similar to the Virginia Act, in order to be constitutional, must come within the police power of the Legislature. It then demonstrates that the Act does not look to or tend in any manner to concern the public safety, nor in any manner relate to or tend to promote the public morals. In this connection the court says:

> It is pertinent to observe that it is not enough to warrant the State in prohibiting a given business that is conducted by methods which do not meet with general approval. There must be something in the methods employed which renders it injurious to the public in some of the ways before mentioned nor is it enough to bring a given business within the prohibitory power of the State that it is so conducted as to seriously interfere with or even destroy the business of others.

Indulging every possible presumption in favor of the validity of such statute the Virginia Court concludes that it is in no way a valid exercise of legislative power. See also *State v. Dodge*, 76 Vt., 197, *Exparte Hutchinson*, 137 Fed. Rep., 950; *Hewin v. City of Atlanta*, 49 S. E. Rep., 765, to the same effect.

This character of legislation has been extended so far by the several states that in the case of *Lochner v. New York*, 198 U. S., 45, 63, this court took occasion to say:

> This interference on the part of the legislatures of the several states with the ordinary trades and occupations of the people seems to be on the

increase. In the Supreme Court of New York, in the case of *People v. Beattie*, appellate division, first department, decided in 1904 (93 App. Div. 383, 89 N. Y. Supp., 193), a statute regulating the trade of horseshoeing, and requiring the person practicing such trade to be examined, and to obtain a certificate from a board of examiners, and file the same with the clerk of the county wherein the person proposes to practice such trade, was held invalid, as an arbitrary interference with personal liberty and private property without due process of law. The attempt was made, unsuccessfully, to justify it as a health law.

The same kind of a statute was held invalid (Re Aubry) by the supreme court of Washington in December, 1904. 78 Pac. Rep., 900. The court held that the act deprived citizens of their liberty and property without due process of law, and denied to them the equal protection of the laws. It also held that the trade of a horseshoer is not a subject of regulation under the police power of the state, as a business concerning and directly affecting the health, welfare, or comfort of its inhabitants; and that, therefore, a law which provided for the examination and registration of horseshoers in certain cities was unconstutional, as an illegitimate exercise of the police power.

The supreme court of Illinois, in *Bessette v. People*, 193 Ill., 334, 56 L. R. A., 558, 62 N. E., 215, also held that a law of the same nature, providing for the regulation and licensing of horseshoers, was unconstitutional as an illegal inter-

ference with the liberty of the individual in adopting and pursuing such calling as he may choose subject only to the restraint necessary to secure the common welfare. See also *Godcharles v. Wigeman*, 113 Pa. St., 431, 437, 6 Atl., 354; *Low v. Rees Printing Co.*, 41 Neb., 127, 145, 24 L. R. A., 702, 43 Am. St. Rep., 670, 59 N. W., 362. In these cases the courts upheld the right of free contract and the right to purchase and sell labor upon such terms as the parties may agree to.

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. *Minnesota v. Barber*, 136 U. S., 313, 34 L. ed. 455, 3 Inters. Com. Rep., 185, 10 Sup. Ct. Rep., 862; *Brimmer v. Rebman*, 138 U. S., 78, 34 L. ed 862, 3 Inters. Com. Rep., 485, 11 Sup. Ct. Rep., 213. The court looks beyond the mere letter of the law in such cases. *Yick Wo. v. Hopkins*; 118 U. S., 356, 30 L. ed. 220, 6 Sup. Ct. Rep., 1064.

We find nothing in the case of *Commonwealth v. Sherman Mnfg. Co.*, 189, Mass., 76, to support the contentions of defendant in error. In that instance the Legislature enacted a law to prevent the use of the armes or the great seal of the commonwealth for advertising or commercial purposes, and the supreme court in sustaining the law, cited with seeming approval the cases of *Ruhstrat v. People*, and *People ex rel, McPike v. Van DeCarr*, above cited and distinguished those cases as follows:

> The statute under which the defendant was convicted differs essentially from those in the cases above referred to. It does not apply to articles manufactured before the act, nor does it apply to the flag of the nation.

V.

The Flag Law is Void for the Reason That It Attempts to Destroy Existing Property Rights.

Under assignments of Error 1, 2, 3 and 4, we contend that the Supreme Court of Nebraska erred in holding that the act of the Nebraska Legislature in question did not seek to destroy existing property rights, in that it did not deprive or tended to deprive the plaintiffs in error of their property without due process of law, contrary to the Constitution of the United States.

It is difficult to comprehend the extensive property rights that would be destroyed if this law is declared constitutional. Some idea of its extent can be obtained by going into the marts of trade and business. We see there almost countless trade labels, into which the national flag is woven in every conceivable shape and design, under which labels, immense business interests

have been built up, and property rights acquired, as in the case of the Stars and Stripes label. Many of these labels are found upon original packages brought into Nebraska from other States under the protection of the interstate commerce law, and in such instances the flag law is a direct burden on interstate commerce. Shall such property rights be stricken down in the face of the constitutional guaranty, "No person shall be deprived of life and liberty without due process of law," under the guise of protecting the flag from desecration? If the flag needs protection certainly the Federal Government can extend that protection better than any State; but if we are not mistaken such protection is opposed to the general policy of the government with respect to the flag, for whenever such laws have been introduced in Congress they have been as often defeated. Congress seems to adhere to the idea that the lesson of national sovereignty of this great nation can in no way be better impressed upon the people than by a universal and respectful use of the national flag; it goes hand in hand with the Declaration of Independence and the Constitution, and its use has been so general and universal during almost a century of national existance that orators and statesmen have found it a fruitful source of applause, painters have sketched its brilliant colors; authors have, in countless ways, woven it into the warp and woof of American literature; the people, ever since the adoption of the Constitution, during presidential elections, have used an emblem in likeness and similitude to the national flag, on which has been printed the portrait or name of one or more of the candidates for that high office; all forms of trade and business have been equally zealous in the use of the flag; so that so general has become its use that it is now as much a part

of our every day life as the air we breathe or the food we eat. At this late day to prohibit the use of the flag, as provided by our State Legislature, is about on a par with a law enjoining the people from making any quotation from the Declaration of Independence or the Constitution of the United States, for advertising purposes.

The Court of Appeals of New York in passing upon the constitutionality of such a law, in the case of *People ex. rel. McPike v. Van De Carr*, 178 N. Y., 425, 429, 70 N. E., page 966, declares:

> The statute, in express terms, therefore, applies as well to articles manufactured and in existence when it was lawful to manufacture them and have them in possession as to those thereafter manufactured or acquired. It attempts, therefore, to destroy existing property rights, and whether the value thereof be much or little, the Legislature is powerless to effectuate such a result. It follows that so much of the statute as precedes the provision affecting those who "shall publicly mutilate, deface, defile, or deny, trample upon, or cast contempt, either by words or act, upon any such flag, standard, color or ensign," is void.

The Nebraska Supreme Court, in the opinion in this case, holds directly contrary to the New York Court above cited, and in support of such holding says:

> When our act against taking fish with a seine went into effect, there were doubtless many seines manufactured and in existence; the same may be said of swivel guns, when the act making it unlaw-

ful to kill certain wild water fowl with such guns became a law.

Circuit Judge Ross, for the Northern District of California in *re Marshall*, 1 2 Fed. Rep., 323, holds that a county ordinance declaring that—

> "Every person, who in the county of Marin shall use any kind of a repeating shotgun, or any kind of a magazine shotgun, for the purpose of killing or destroying any kind of wild duck, geese, quail, partridge, doves, or any other birds, shall be guilty of a misdemeanor," and further prescribing a penalty for its violation, is void, as depriving the petitioner the use of such a gun, and therefore depriving him of his property, without due process of law.

So we imagine that swivel guns, seines, or any other property under like circumstances would come under this rule. However, statutes regulating the killing of game are to be distinguished from the one in question in that wild game belongs to the whole people, and courts have universally held that the legislatures of the several states may dispose of such game as may seem best, and that such laws are entirely within the police power of the state, subject only to the constitutional limitations against unjust discriminations.

The law prohibiting the use of the flag for advertising purposes is in no sense intended to regulate the sale of intoxicating liquors, but applies to all persons, trades or business, not exempt by the statute, within the state of Nebraska, and the law of the cases relating to the sale of intoxicating liquors, has no application to this case. The flag law relates to a national subject, not local, and prohibits acts in themselves innocent and

harmless; while the sale of intoxicating liquor is classed by the courts as an act dangerous to the public, and the sale thereof may be prohibited altogether, notwithstanding such law may result in a wholesale destruction of property values. This important distinction seems to have been entirely disregarded in the opinion of the court in this case, (Printed record page 26). The rule is stated in re Marshall 102, Fed. Rep., 325 above cited as follows:

> It is not denied on the part of the petitioner, and cannot be successfully denied that private property and private rights must always yield where the public safety, public health, or public morals demand the sacrifice. Thus, if a great conflagration is spreading towards one's house, and the public exigency demands it, the individual's home may be torn down or blown up, if such drastic measure be necessary to stay the fire. So may gambling and dance houses and such devices and other things as have direct relation to public morals be absolutely inhibited and prohibited. On the same principle,—that of danger to the public,—it is held that the sale of intoxicating liquor by retail may be entirely prohibited, and the value of breweries destroyed, by the laws prohibiting the manufacture of malt liquors. *Crowley v. Christensen*, 137 U. S., 86, 11 Sup. Ct. 13, 34 L. Ed., 620; *Mugler v. Kansas*, 123 U. S., 669, 8 Sup. Ct., 273, 31 L. Ed., 205. * * * "The constitutional guaranty," said the court of appeals of New York in re Jacobs, 98 N. Y., 105, "that no person shall be deprived of property without due process of law, may be violated without the physical taking

> of property for public or private use. Property may be destroyed, or its value may be annihilated. It is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes, without which property cannot be conceived, and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property." See also *Pumpelly v. Green Bay Co.*, 13 Wall., 177, 20 L. Ed., 557; *Wynehamer v. People*, 13 N. Y., 398; *People v. Otis*, 90 N. Y., 48; *People v. Orange Co. Road Construction Co.*, 175 N. Y., 84, 93.

In the case of *Sentell v. New Orleans etc. R. Co.*, 166 U. S., 705, 41 L. Ed, 1169, involving the constitutionality of a law of the State of Louisiana requiring dogs to be placed on the assessment rolls, and limiting any recovery by the owner to the value fixed by himself, for the purposes of taxation, this court discussing generally the police power said:

> It is true that under the 14th Amendment, no state can deprive a person of his life, liberty or property without due process of law; but in determining what is due process of law we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power. So far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner; but so far as it is dangerous to the safety or

health of the community, due process of law may authorize its summary destruction.

Applying to this case the above rule as announced by this court, the State Legislature and the courts were bound to consider; (1) The property, whether much or little, invested in business enterprises, developed under trade marks, bearing a cut or picture of the flag, long prior to the enactment of this law; (2) No valid reason can be assigned, based upon the public morals, peace, safety, welfare or comfort, requiring the immediate destruction of such property values; (3) That prior to the enactment of the flag law by the Nebraska Legislature such an arbitrary exercise of the police power had not been attempted by the state, nor has it been generally recognized as within the police power of the state; (4) That the property and rights the flag law seeks to take are inoffensive and harmless, and can only be condemned or destroyed by legal proceedings with due notice to the owners.

According to this test it would seem as nearly conclusive as anything can, short of mathematical demonstration, that the ruling of the New York court above cited is a correct statement of the law of this case, and the Nebraska Supreme Court erred in holding to the contrary.

VI.

The Flag Law is Class Legislation, and, Therefore Null and Void.

It is again contended under assignments of error 1, 8, 9, 10, 11, that the Nebraska Supreme Court erred in holding that the act of the legislature of Nebraska

in question was not unduly discriminative, and therefore not class legislation. On the contrary we contend that this law directly permits the publishers of newspapers and books, the stationer and the jeweler to use the flag in their business, to place it upon their goods and wares, thereby attracting attention to them, advertising them, and by such means increasing their trade and business; but if any other merchant or business man uses the flag in his business, or as a part of a trademark, under which his business is carried on, he thereupon becomes subject to the pains and penalties of this statute. The provision to which the exception is taken, is as follows:

> This act shall not apply, * * * *
> nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, or stationary for use in correspondence, on any of which shall be printed, painted or placed, said flag, disconnected from any advertisment.

It is declared in the case of *People ex rel, McPike v. Van DeCarr*, Id., 91 N. Y. Sup. Ct. Rep., 20, 29 that—

> The merchant and the manufacturer are made criminals for using such representation, while the book publisher, the newspaper proprietor, the jeweler and the stationer are permitted to use the symbol in their business, to put it upon their merchandise, and to make profit by its use. The situation is not saved by the introduction into the statute of the proviso that the stationer, the book publisher, the jeweler and the newspaper proprietor may use the representation

> of the flag so long as it is disconnected from any advertisement. The representation of the flag is impressed upon the goods of such persons, and they "call attention to" and advertise by it. The label and the trademark are, or may be, equally impressed upon the goods of other persons. In either case, there is no substantial difference in the use of the symbol or representation of the flag. Certain classes of men by this law are allowed to use that representation of the flag, for their own profit, on their merchandise, while others are not only debarred from doing so, but are subjected to the penalties imposed for the commission of a crime. What is that but class legislation?

While there may be a classification of subjects for legislative purposes, such classification must be reasonable, not arbitrary; must arise out of consideration of sound reasons of public policy, not mere whims—advantages extended to one citizen and denied to another.

In the case of *Lancashire Ins. Co. v. Bush*, 60 Neb., 123, it is said.

> There is nothing in the Constitution of the United States, or of this State, which forbids classification of subjects for the purpose of Legislation. *Barbier v. Connolly*, 113 U. S., 27; *Atchison, T. & S. F. R. Co. v. Mathews*, 174 U. S., 96; *State v. Farmers & Merchants Irrigation Co.*, 59 Neb., 1, The power of the Legislature to classify its subject only to the limitation that the classification must not be arbitrary. There must be some just reason for the creation of the class

to be exclusively affected by legislative action. In *State v. Farmers & Merchants Irrigation Co., supra*, page 3, it was said: 'The rule established by the authorities is that, while it is competent for the Legislature to classify, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of divers legislation with respect to the objects classified.' 'The difference which will support class legislation,' says Mr. Justice Brewer in *Gulf C. & S. F. R. Co. v. Ellis*, 165, U. S., 150, 155, 'must be such as in the nature of things furnishes a reasonable basis for separate laws and regulations.'

The Supreme Court of Illinois in the case of *Ruhstrat v. People*, above cited, page 147, also declares:

> The act is also unduly discriminating and partial in its character. It exempts from penalties imposed by the act persons who may choose to make use of the national flag or emblem for either public or private exhibitions of art. The exhibitor who engages in public or private exhibitions of art may do so, not merely for the public benefit, but for the promotion of his own interests, by thus excluding artists or exhibitors from the inhibitions of section 1, of the Act, the act thereby creates a class or classes of persons who are exempted from the penalties embraced therein. Legislation of this kind has frequently been condemned by the Courts in this country. The Legislature clearly has no power to deny to plaintiff in error the right to use the national

flag to advertise his business, or, in other words, to deny to all persons following particular occupations the right to use the national flag, and at the same time to permit artists or art exhibitors to use the same. The manner in which the act thus discriminates in favor of one class of occupations and against all others, places it in opposition to the constitutional guaranties hereinbefore referred to. *Millett v. People*, 117 Ill., 294, 57 Am. Rep., 869, 7 N. E., 631; *Ritchie v. People*, 155, Ill., 98, 29 L. R. A., 79, 40 N. E., 454.

Class legislation of the character of the act in issue enacted by the States which discriminates in favor of one person or set of persons and against another or others is forbidden by the Fourteenth Amendment. *Gulf C. & S. F. R. Co. v. Ellis*, 165 U. S., 150; *Cotting v. Kansas City S. Y. Co.*, 183 U. S., 79, 106; *Connolly v. U. S. P. Co.*, 184 U. S., 540, 559; *People v. Orange County Road Co.*, 175 N. Y., 87, 90.

The equal protection of the laws is a pledge of the protection of equal laws. *Yick Wo v. Hopkins*, 118 U. S., 356, 369; *Gibbons v. Ogden*, 9 Wheat, 1, 210; *Sinnot v. Davenport*, 22 How., 227, 243; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S., 746; *M. K. & T. Co. v. Haber*, 169 U. S., 613, 626.

CONCLUSION.

We confidently submit the foregoing in the belief that this court will declare unconstitutional that part of the flag law enacted by the Nebraska Legislature July 9, 1903 under which the plaintiffs in error are prosecuted, as follows:

Or who shall expose to public view, manu-

> facture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article, or substance, being an article of merchandise, or a receptacle of merchandise, upon which shall have been printed, painted, attached, or otherwise placed, a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article or substance, on which, placed, * * * * *

for the reason that the flag is the emblem of national sovereignty of the people of the United States, under the constitution and laws of the United States, and federal control over the same is exclusive of state legislation; that so much of the law in question is in conflict with the Fourteenth Amendment to the Federal Constitution, in depriving the plaintiffs in error of a privilege impliedly granted them under the Constitution; that the police power of the state confers no authority upon the legislature of Nebraska to enact such a law; that the above provision of the law is void for the reason that it attempts to destroy existing property rights; that such provision is unconstitutional and void in that the same is unduly discriminative and class legislation; and therefore the judgment of the Supreme Court of the State of Nebraska should be reversed.

Respectfully submitted,

SYLVESTER R. RUSH,

Attorney for Plaintiffs in Error.

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FILE COPY.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk

No. 174.

NICHOLAS V. HALTER AND HARRY V. HAYWARD,
Plaintiffs in Error,

v.

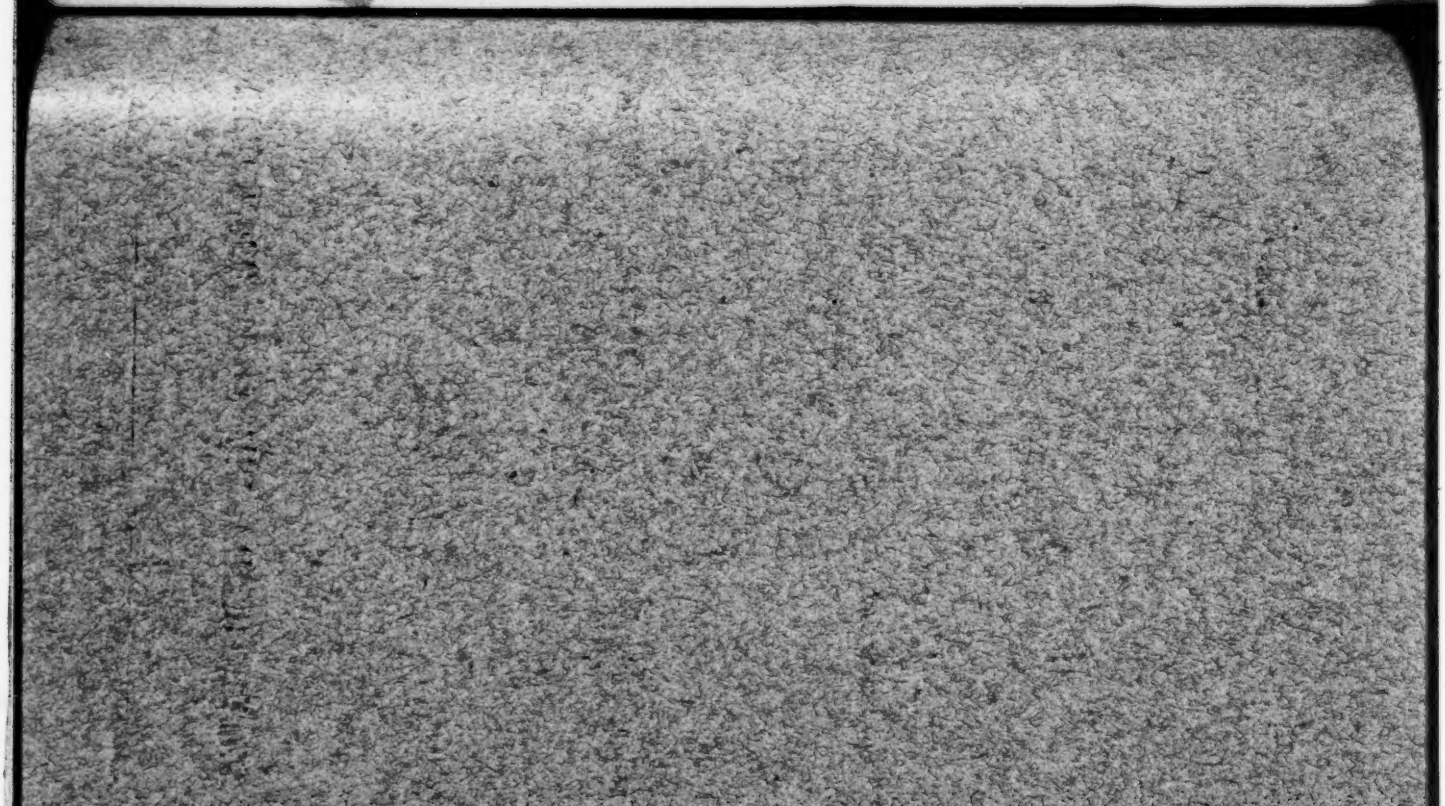
THE STATE OF NEBRASKA.

ERROR FROM THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF THE STATE.

NORRIS BROWN, ATTORNEY GENERAL,
For the State.

STATE JOURNAL CO., LAW BOOK MANUFACTURERS AND 17TH STS., LINCOLN, NEB.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

NICHOLAS V. HALTER AND HARRY V. HAYWARD, *Plaintiffs in Error,* v. THE STATE OF NEBRASKA.

No. 174.

ERROR FROM THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF THE STATE.

NORRIS BROWN, *Attorney General, for the State.*

POINTS AND AUTHORITIES.

I.

Under the police power of the state the legislature may enact laws to punish persons who desecrate the national emblem or use it for advertising a private business.

Updegraph v. Commonwealth, 11 Serg. & Rawl. [Pa.] 406.

Vidal v. Girard, 2 How. [U. S.] 198.

II.

No act of congress or provision of the state or federal constitutions prohibits the legislature of Nebraska from enacting a law to prevent the desecration or misuse of the flag of the United States, and the state is left free to enact such a law.

Fox v. State, 5 How. [U. S.] 410.

III.

The flag law is not unconstitutional as destroying existing property rights.

Patterson v. Kentucky, 97 U. S. 507.
Mugler v. Kansas, 123 U. S. 623.

IV.

The flag law is not unconstitutioual as class legislation.

Mugler v. Kansas, 123 U. S. 660.

V.

The Illinois and New York cases cited in support of the objection to the flag law of Nebraska are not precedents to be followed.

Vidal v. Girard, 2 How. [U. S.] 198.
Ex parte Siebold, 100 U. S. 389.
Fox v. State, 5 How. [U. S.] 410.
Patterson v. Kentucky, 97 U. S. 507.
Mugler v. Kansas, 123 U. S. 623.
Davis v. State, 51 Neb. 302.
Rosenbloom v. State, 64 Neb. 344.

STATEMENT.

Plaintiffs in error were convicted in the district court of Douglas county, Nebraska, of having desecrated the flag of the United States, and each was sentenced to pay a fine of $100 and costs. They committed the offense by exposing to view, advertising and selling beer in a bottle upon which the American flag had been emblazoned. An appeal was taken to the supreme court of Nebraska where the judgment of the district court was affirmed. (See opinion of supreme court of Nebraska, pp. 21-26 of the printed record.) The case is now in this court on a writ of error.

The statute of Nebraska forbidding such a desecration of the national emblem is as follows:

"Any person who in any manner, for exhibition or display, shall place, or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color, or ensign, of the United States of America, or shall expose or cause to be exposed to public view any such flag, standard, color, or ensign, upon which shall be printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article, or substance, being an article of merchandise, or a receptacle of merchandise, upon which shall have been printed, painted, attached or otherwise placed, a representation of any such flag, standard, color, or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article, or substance, on which so placed, or who shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt, either by words or act, upon any such flag, standard, color, or ensign, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars, or by imprisonment for not more than thirty days, or both,

in the discretion of the court." (Criminal Code, sec. 245e[9].)

There is no dispute about the facts. Plaintiffs in error admit they violated the statute quoted by keeping, advertising and selling beer in a bottle bearing a representation of the flag of the United States, but insist the statute is void.

I.

Under the police power of the state the legislature may enact laws to punish persons who desecrate the national emblem or use it for advertising a private business.

The statute of Nebraska denouncing the desecration of the flag and forbidding its use by individuals for advertising purposes is within the police power of the state. Patriotic sentiment for the stars and stripes is as legitimate a subject of legislation as property rights. The legislature may not only enact laws to protect life, person and property from trespass, but may impose penalties upon those who do not observe a decent respect for the patriotic, moral, and religious sentiments and feelings of others. The religious liberty guaranteed by the constitution does not give the atheist or pagan an unbridled license to go among Christians and blaspheme their Deity. The personal liberty vouchsafed to the people does not permit a man to make an indecent exposure of his person, to use obscene language in the hearing of others, or to provoke an assault or breach of the peace. Police power extends to these subjects, because the state demands from every man a decent respect for the moral and religious feelings and sentiments of others. Patriotic sentiment for the flag and for the noble institutions it symbolizes is outraged by the appearance of the national emblem on a bottle of beer. The sentiments and beliefs of the soldiers who kept the

stars and stripes above all the bloody fields of the Republic ought to be protected by the state from insult and outrage, and the feelings of all patriotic citizens who love their country should be made the subject of police legislation.

It was never the intention of any constitutional provision enacted for the protection of liberty or vested rights to give to any man the monopoly of using the stars and stripes on a brand of beer. The flag was never intended for any such purpose, and every argument and opinion to the contrary is on the side of a pernicious doctrine which has no foundation in justice or reason.

Even if patriotic sentiment, beliefs and feelings for the flag were not entitled to police protection, the police power of the state, on another ground, could be asserted to prevent a desecration or misuse of the national emblem.

An offense against society does not consist merely in an actual breach of the peace, but may include whatever tends to provoke or incite persons to commit a breach of the peace. To desecrate the flag by using it for the purpose of advertising a business which has to be licensed and kept under the surveillance of the police, is to provoke an assault against the offender, and to incite indignant citizens to commit a breach of the peace. Can a soldier who fought for the flag and followed it for years, wherever it floated above the carnage of war, pass a beer sign emblazoned with the stars and stripes without an impulse to smash the sign? Is there no power in the state he saved to protect him from such an insult? Desecration and misuse of the flag are quickly resented. Occurrences are frequently reported in the daily press where violent hands are laid on persons who offer indignities to the flag in public places. In times of peace the patriotic sentiment of loyal citizens is that the flag shall be kept sacred as a national emblem and free from misuse or insult. In times of war the sentiment

is, "If any man attempts to haul down the American flag, shoot him on the spot." An insult to or misuse of the flag is a menace to the peace of society. It tends to provoke an assault and incites men to violence. Under the police power of the state, therefore, the legislature may enact statutes to prevent desecration or misuse of the flag. For private individuals to make use of the stars and stripes to advertise their goods, is a misuse of the national emblem. To make it a part of a trade-mark for a brand of beer is an affront to every patriotic citizen.

The statute assailed in this case grew out of patriotism and the love of good government. It is a law demanded by soldiers and other patriotic citizens whose sensibilities have been shocked by misuse of the flag.

The principles invoked by the state of Nebraska in this case are enforced every day in the police courts of the country. Offenders are being continually fined for not observing a decent respect for the sensibilties and sentiments of others. Convictions for licentious or profane conversations, for using language calculated to provoke an assault, and for other offenses which injure the feelings of others are frequent occurrences in the cities of the country. These punishments are inflicted because the police power is interposed to enforce a proper respect for the beliefs, sentiments, and moral and religious convictions of the people.

The right of the state to interpose its police power in such cases is sanctioned by text-writers, by the state courts, and by the supreme court of the United States. Without the enforcement of such laws, liberty and vested rights would avail but little.

In *Updegraph v. Commonwealth*, 11 Serg. & Rawl. [Pa.], 406, the supreme court of Pennsylvania said:

"An offense against the public peace may consist either of an actual breach of the peace, *or doing that which tends to provoke and excite others to do it. Within the latter description fall all acts and all attempts to produce disorder, by written, printed, or oral communications, for the purpose of generally weakening those religious and moral restraints, without the aid of which mere legislative provisions would prove ineffectual.*"

The doctrine of the supreme court of Pennsylvania in *Updegraph v. Commonwealth*, has been sanctioned by Mr. Justice STORY in *Vidal v. Girard*, 2 How. [U. S.] 198, wherein that eminent jurist said:

"We are compelled to admit that although Christianity be no part of the common law of this state, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, *to the annoyance of believers or the injury of the public.*"

Tiedeman, in his work on Limitations of Police Power, says (p. 168):

"Blasphemy is punishable, because, as already stated, it *works an annoyance to the believer* and an injury to the public."

It is unnecessary to cite cases in support of the doctrine that feelings, beliefs and sentiments founded on morality, religion and the demands of good government, may be protected by the police power of the state. Injury to these attributes of human nature often inflicts greater pain and suffering and causes greater disturbances than any possible invasion of property rights.

When the colonies separated from England, they professed a decent respect for the opinions of mankind. The first sentence in the Declaration of Independence contains these words:

"*A decent respect to the opinions of mankind* requires

that they should declare the causes which impel them to a separation."

Liberty must have gone to seed if there is now no power in the state to enforce a decent respect for the opinions of those patriotic citizens who believe that a beer sign is not a proper place to emblazon the stars and stripes.

The purpose of the act is to enforce a proper respect for the feelings of others, to promote patriotism, morality, order, and the general welfare, and to prevent disturbances of the peace, by making provision for the punishment of those who desecrate or misuse the flag.

II.

No act of congress or provision of the state or federal constitutions prohibits the legislature of Nebraska from enacting a law to prevent the desecration or misuse of the flag of the United States, and the state is left free to enact such a law.

Plaintiffs in error argue that the statute of Nebraska forbidding the desecration or misuse of the flag is void because the flag is solely a creation of federal law, and for that reason they insist a state has no right to prescribe the use that may be made of it by the people of the United States.

An examination of the argument on this point will show that it affords no ground for striking down the statute of Nebraska. There is no limitation upon the police power of this state except that imposed by the state and federal constitutions or by acts of congress exclusively within federal jurisdiction. The lawmakers are hampered by no limitations except those imposed by the supreme law or acts of congress. The rule has been stated by the supreme court of Nebraska as follows:

"State constitutions are not grants of authority, but limitations of power. *State legislatures can exercise such powers as are not inhibited by the fundamental law.*" (*Scott v. Flowers*, 60 Neb. 685.)

No provision of the state or federal constitutions nor any act of congress prohibits the legislature of Nebraska, in the exercise of police power, from enacting a law to prevent the desecration or misuse of the flag of the United States. The state legislature, therefore, in the interests of the public welfare, may enact such a law; nor can it be argued that the spirit of the constitution puts a limit on legislative action. In the state of Nebraska, as elsewhere, the spirit of the fundamental law can no longer be invoked to strike down an act of the legislature. (*Redell v. Moores*, 63 Neb. 219, overruling *State v. Moores*, 55 Neb. 480.)

The constitution of the United States does not provide for any law regulating the use of the flag. But on February 20, 1905 (which was subsequent to the trial and conviction of plaintiffs in error), congress recognized and asserted the right to enact a law providing that any trademark which "consists of or comprises the flag or coat of arms or other insignia of the United States, or any simulation thereof, or of any state or municipality, or of any foreign nation," shall be refused registration. (Supp. U. S. Compiled Statutes, 1905, sec. 5, ch. 2, p. 670.)

The flag of the United States is also the flag of the state, in the state's connection with the nation. There are many subjects of police regulation upon which both the state and the nation may legislate, and the acts of both may be enforced where they do not conflict. The rule is that wherever they are repugnant, the acts of congress prevail. Having possession of counterfeit coin in a state may be punishable as well under state as under

federal laws. (*State v. Washburn*, 11 Iowa, 245; *Fox v. State*, 5 How. [U. S.] 410.) Offenders against naturalization laws passed by congress may be punished by both state and federal enactments. (*Ex parte Siebold*, 100 U. S. 391.) An offender against a federal statute establishing weights and measures may be amenable to both the state and the nation. (*Ex parte Siebold*, 100 U. S. 391.) Election officers, for unlawful conduct at elections for congressmen, may be punished by state and federal authority. (*Ex parte Siebold*, 100 U. S. 391.) It has been adjudicated by the supreme court of the United States that the police power of the state and nation may be concurrently exercised.

In *Moore v. State*, 14 How. [U. S.] 19, the supreme court of the United States said:

"Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both."

It is no answer to this argument to say that a person may thus be twice punished for the same offense. In discussing this question the supreme court of the United States, in *Ex parte Siebold*, 100 U. S. 389, said:

"Another objection made is, that, if congress can impose penalties for violation of state laws, the officer will be made liable to double punishment for delinquency,—at the suit of the state, and at the suit of the United States; but the answer to this is, that each government punishes for violation of duty to itself only. Where a person owes a duty to two sovereigns, he is amenable to both for its performance; and either may call him to account. Whether punishment inflicted by one can be pleaded in bar to a charge by the other for the same identical act need not now be decided; although considerable discussion bearing upon the subject has taken place in this court, tending to the conclusion that such a plea cannot be sustained."

The cases cited from the supreme court of the United States show beyond question that the state and national governments, in the exercise of police power, may both make provision by statute for the punishment of offenses, and that this is true, though the subject might be one over which congress could exercise,—but which in this case it has not exercised,—exclusive jurisdiction. The case cited by plaintiffs in error (*Ruhstrat v. People*, 185 Ill. 133), in so far as it states a rule different from that adopted by the supreme court of the United States, should be ignored.

The constitution of the United States grants to congress the power to coin money, to regulate the value thereof, to fix the standard of weights and measures, and to provide for the punishment of counterfeiting securities and current coin of the United States; but these provisions of the federal constitution do not take away from the state the police power to punish those who counterfeit coin or make use of false weights or measures.

The counterfeiting of coin is forbidden by section 145 of the Criminal Code of the state of Nebraska. Other states have enacted and enforced such statutes. Such enactments for the protection of the public and the prevention of crime are strictly within the police power of the state. In speaking of the state's jurisdiction over such offenses, the supreme court of the United States said:

"Such a jurisdiction, if not indispensable, is to the last degree useful and expedient. And it has been exercised almost, if not quite, universally by the different states which compose the Union. The rightfulness of this jurisdiction is now, for the first time, questioned in this court. Certainly it presents a question of the first magnitude, for no one can foresee what may be the consequences of taking from the state the power of self-protection, which they have so long exercised, against a class of criminals swarming over the entire Union, and against a species of crime which, more than any other, affects the common business of the people.

"The argument against the exercise of this jurisdiction by the states proceeds upon the ground that it exclusively belongs to the courts of the United States, and that it arises out of the provisions of the constitution giving to congress the power to coin money, regulate its value and the value of foreign coin, and to punish the counterfeiting of the current coin of the United States; and out of the exercise of these powers by congress in the enactment of laws regulating the coin, and providing punishment for the offense of counterfeiting.

"The question is simply one of criminal jurisdiction over an offense cognizable in every state of the Union, either at the common law or by virtue of state legislation.

"It is clear, in the first place, that this branch of criminal jurisdiction belonged to the states, respectively, before the adoption of the constitution; and that it continues with them, unless it has been wholly surrendered to the federal government. It is also clear, that there is no express prohibition in the constitution to the exercise of this jurisdiction by the states. The exclusion of state jurisdiction is argued from the fact that the constitution vests a jurisdiction over this offense in the United States, by authorizing congress to pass laws for its punishment, which jurisdiction, it is said, must necessarily be exclusive. We deny this inference, and claim that the jurisdiction may be concurrent.

"The mere grant of a power in the constitution has never been held to divest the states of the power so granted. *There must be something more; either a prohibition, a grant in exclusive terms, or a manifest incompatibility.*" (*Fox v. State*, 5 How. [U. S.] 416.)

By the rulings of the highest court of the land, therefore, it is made clear that the legislature of the state of Nebraska, in enacting the statute which prohibits a desecration or misuse of the flag, did not intrude on the exclusive jurisdiction of congress, and the argument of plaintiffs in error to the effect that the flag is solely a creation of federal law, and in consequence the state has no right to prescribe the use that may be made of it by the people, must fail.

III.

The flag law is not unconstitutional as destroying existing property rights.

Plaintiffs in error are engaged in selling beer, and use a trade-mark which they call the "Stars and Stripes." Their trade-mark bears a representation of the flag of the United States, and they argue that the flag law of Nebraska, in providing for their punishment for making such a use of the flag, deprives them of property rights guaranteed by the constitution, and is therefore void.

The argument on this point attaches to their trade-mark a dignity and importance not warranted by the law of the land. Trade-marks are subject to police regulation. Persons who use an improper or offensive trade-mark cannot make it a shield to disturb or annoy the public. A man may not use an obscene or offensive trade-mark and defy the law by pleading liberty and property rights. A crook or confidence man may procure a patent or trade-mark for a lottery wheel, but he cannot prevent the officers of the law from seizing him and his property when he uses the patented article for conducting a lottery. For the same reason, the police power of the state may be interposed to prevent him from using the flag in such a manner as to annoy patriotic citizens, and to incite them to commit a breach of the peace. A trade-mark or patent puts no restraint on police power. In discussing the effect of a patent in connection with statutory regulations of a state the supreme court of the United States said:

"The end of the statute was to encourage useful inventions, and to hold forth, as inducements to the inventor, the exclusive use of his inventions for a limited period. The sole operation of the statute is to enable him to prevent others from using the products of his labors except with his consent. But his own right of using is not en-

larged or affected. There remains in him, as in every other citizen, the power to manage his property, or give direction to his labor at his pleasure, *subject only to the paramount claims of society, which require that his enjoyment may be modified by the exigencies of the community to which he belongs, and regulated by laws which render it subservient to the general welfare, if held subject to state control.*" (*Patterson v. Kentucky*, 97 U. S. 507.)

The patent or trade-mark on a dangerous drug or explosive does not prevent the state from prohibiting the sale of the patented article. (*Patterson v. Kentucky*, 97 U. S. 501.)

In the exercise of police power the state of Nebraska may not only interfere with the trade-mark on the beer sold by plaintiffs in error, but may absolutely prohibit the sale of beer in the state, and thus make their property valueless. (*Mugler v. Kansas*, 123 U. S. 623.)

Prior to prohibition in Kansas, brewers with vast property interests had established breweries in that state. These brewers no doubt had trade-marks and patents in addition to other property rights, and they resisted the prohibitory laws of Kansas to the last extremity, on the ground that those laws deprived them of property rights, of liberty, of equal protection of the laws, and of other rights guaranteed by the state and federal constitutions.

The supreme court of the United States decided all these questions against the brewers, and vindicated the state in its exercise of police power, laying down the following rules:

"The prohibition by the state of Kansas, in its constitution and laws, of the manufacture or sale within the limits of the state of intoxicating liquors for general use there as a beverage, is fairly adapted to the end of protecting the community against the evils which result from excessive use of ardent spirits; and is not subject to the objection,

that, under the guise of police regulations, the state is aiming to deprive the citizen of his constitutional rights.

"Lawful state legislation, in the exercise of the police powers of the state, to prohibit the manufacture and sale within the state of spirituous, malt, vinous, fermented, or other intoxicating liquors, to be used as a beverage, *may be enforced against persons who, at the time, happen to own property whose chief value consists in its fitness for such manufacturing purposes, without compensating them for the diminution in its value resulting from such prohibitory enactments.*" (*Mugler v. Kansas*, 123 U. S. 623.)

According to the highest court of the land, therefore, the right of the state, in the exercise of police power, to interfere with property rights is beyond question. The legislature of the state has such power. When this power should be exercised is a question for the lawmakers, and not for the courts. It is for the legislature to decide when the time has arrived to exercise the police power in any particular direction, or whether desecration and misuse of the flag should be prohibited. In discussing the exercise of police power, the supreme court of the United States has said:

"But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. *It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.*" (*Mugler v. Kansas*, 123 U. S. 660-661.)

Since the legislature of Nebraska, in enacting the flag

law, has entered a field where its power is legitimate, it is not for the courts to interfere.

Plaintiffs in error, on page 7 of their brief filed in the supreme court of Nebraska, make this statement:

"The flag is an emblem of national sovereignty and the property of the people of the United States, under the laws and constitution of the United States."

If it be true, as stated by plaintiffs in error, that the flag is an emblem of national authority and the property of the people of *the United States*, how can it be possible for individuals to acquire exclusive property rights in the stars and stripes? If the flag is the property of the people, how can plaintiffs in error obtain the exclusive right to use it on their brand of beer? If the flag is the property of the people, what is to prevent the state from enacting laws to protect that property from desecration and misuse? The statute books of this and other states are full of laws enacted to protect the emblem of The Grand Army of the Republic, and of other societies. Why should not the flag, the emblem of the United States, be likewise protected? It is insisted by the state that the legislation on this subject is both valid and proper.

IV.

The flag law is not unconstitutional as class legislation.

Section 3 of the flag law forbidding the desecration or misuse of the flag provides:

"This act shall not apply to any act permitted by the statutes of the United States of America or by the United States Army and Navy Regulations, nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of

jewelry, or stationery for use in correspondence, on any of which shall be printed, painted, or placed, said flag, *disconnected from any advertisement.* (Criminal Code, sec. 245*a*[11].)

Plaintiffs in error argue that the foregoing provision is class legislation and that it, for that reason, invalidates the flag law. This argument is based on their assertion that the "law directly permits publishers of newspapers and books, the stationer and the jeweler, to use the flag in their business, to place it upon their goods and wares, and thereby attract attention—advertising—and so increase their trade and business."

Examination of this act will show that publishers, stationers and jewelers are only permitted to use the flag in the manner stated in the law, when the flag so used is "*disconnected from any advertisement.*" The classes named, therefore, are not permitted to use the flag in connection with any advertisement, but are permitted to display it as a national emblem. When not used in connection with any advertisement, the legislature, in the exercise of police power, has said it is a proper use of the flag, when disconnected from an advertisement, to allow it to appear on "a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, or stationery for use in correspondence." It was competent for the legislature to decide that these were proper uses of the flag, and the privileges are extended to all alike. Such a use of the national emblem annoys no one, and does not incite persons to commit a breach of the peace. The distinction made by the lawmakers is a proper one, and to them alone the police power was committed. (*Mugler v. Kansas*, 123 U. S. 660.)

Even if the purposes of the classification or distinction made by the legislature were correctly stated by plaintiffs

in error, the law would not be unconstitutional. The power to make classifications for the purposes of legislation has been committed to the legislature. In the state of Nebraska the lawmakers recently enacted a statute which provided for the punishment of peddlers who sell goods manufactured by others within the county, while those who sell goods manufactured by themselves were not subject to such punishment. This enactment was sustained by the supreme court of the state as a proper classification and as valid legislation. (*Rosenbloom v. State*, 64 Neb. 344.) While the ruling applied to legislation on the subject of taxation, the rule is the same when applied to a police regulation against peddlers. (*State v. Montgomery*, 43 Atl. [Me.] 13; *Ex parte Thornton*, 12 Fed. 538.) The argument, therefore, that the flag law of Nebraska should be condemned as class legislation is wholly without merit.

The arguments of the plaintiff in error under this head are also untenable on another ground. In the state of Nebraska the legislature has plenary power in defining crimes and in prescribing punishment therefor. (*Davis v. State*, 51 Neb. 302.)

In 12 Cyclopedia of Law and Procedure, p. 136, the doctrine is stated as follows:

"The legislatures of the different states have the inherent power to prohibit and punish any act as a crime, provided they do not violate the restrictions of the state and federal constitutions; and the court cannot look further into the propriety of a penal statute than to ascertain whether the legislature had the power to enact it."

In a note to this paragraph may be found a long line of cases to sustain the principle stated. The very power to define a crime includes the power to classify and to describe the persons and acts that come within the operation

of the penal statute. The classification or distinction made by the legislature, therefore, affords no ground whatever for holding the flag law invalid.

V.

The Illinois and New York cases cited in support of the objection to the flag law of Nebraska are not precedents to be followed.

It is earnestly insisted by the state that the holdings in which enactments to prevent the desecration and misuse of the flag, have been held invalid should not be followed. The writers of the opinions in those cases missed the philosophy of flag legislation. In the Illinois case it will be observed that the chief justice and two other members of the court dissented; and the New York decision adds nothing to what was said in the Illinois case.

In the opinion of the supreme court of Nebraska in the case at bar (pp. 21-26, printed record), these two decisions are reviewed at length, and the court refused to follow them.

The opinions in the Illinois and New York cases contradict elementary principles laid down by this court. An examination of those cases will disclose that they violate the following rules, which are essential to the proper government of society:

1. The state, in the exercise of police power, may demand from every man a decent respect for the moral, religious and patriotic sentiments of others and punish persons who incite others to break the peace. (*Vidal v. Girard*, 2 How. [U. S.] 198.)

2. The police powers of the state and nation may be concurrently exercised to punish the same acts. (*Ex parte Siebold*, 100 U. S. 389; *Fox v. State*, 5 How. [U. S.] 410.)

3. The state, in the exercise of police power, may interfere with trade-marks and property rights. (*Patterson v. Kentucky*, 97 U. S. 507; *Mugler v. Kansas*, 123 U. S. 623.)

4. The state has plenary power to describe and punish offenses, and for that purpose the legislature may make classifications and distinctions. (*Mugler v. Kansas*, 123 U. S. 660; *Davis v. State*, 51 Neb. 302; *Rosenbloom v. State*, 64 Neb. 344.)

The principles stated are violated by the decisions holding the flag law invalid. It is earnestly insisted that the opinion of the supreme court of Nebraska correctly sustains the flag law of Nebraska, and should be affirmed.

Respectfully submitted,

Norris Brown, *Attorney General,*
For the State.

Supreme Court of the United States.

No. 174.—October Term, 1906.

Nicholas V. Halter and Harry V. Hayward, Plaintiffs in Error, *vs.* The State of Nebraska.	In error to the Supreme Court of the State of Nebraska.

[March 4th 1907.]

Mr. Justice Harlan delivered the opinion of the Court.

This case involves the validity, under the Constitution of the United States, of an act of the State of Nebraska, approved July 3d 1903, entitled "An act to prevent and punish the desecration of the flag of the United States." *

The act, among other things, makes it a misdemeanor, punishable by fine or imprisonment, or both, for any one to sell, expose for sale, or have in possession for sale, any article of merchandise, upon which shall have been printed or placed, for purposes of *advertisement*, a representation of the flag of the United States. It expressly excepted, however, from its

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*"§ 2375*g*. Any person who in any manner, for exhibition or display shall place, or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color, or ensign, of the United States of America, or shall expose or cause to be exposed to public view any such flag, standard, color, or ensign, upon which shall be printed, painted or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article or substance, being an article of merchandise, or a receptacle of merchandise, upon which shall have been printed, painted, attached or otherwise placed, a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article, or substanee on which so placed, or who shall publicly mutilate. deface, defile, or defy, trample upon or cast contempt, either by words, or act, upon any such flag, standard, color or ensign, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars, or by imprisonment for not more than thirty days, or both in the discretion of the court.

"§ 2375*h*. The words flag, color, ensign, as used in this act shall include any flag, standard, ensign, or any picture or representation, or either thereof, made of any

operation any newspaper, periodical, book, &c., on which should be printed, painted or placed a representation of the flag "*disconnected from any advertisement.*" 1 *Cobbey's Ann. Stat. Neb.* 1903, c. 139.

The plaintiffs in error were proceeded against by criminal information upon the charge of having, in violation of the statute, unlawfully exposed to public view, sold, exposed for sale, and had in their possession for sale a bottle of beer, upon which, for purposes of advertisement, was printed and painted a representation of the flag of the United States.

The defendants pleaded not guilty, and at the trial insisted that the statute in question was null and void, as infringing their personal liberty guaranteed by the Fourteenth Amendment of the Constitution of the United States, and depriving them, as citizens of the United States, of the right of exercising a privilege, impliedly if not expressly guaranteed by the Federal Constitution; also, that the statute was invalid in that it permitted the use of the flag by publishers, newspapers, books, periodicals, &c., under certain circumstances—thus, it was alleged, discriminating in favor of one class and against others. These contentions were overruled and the defendants having been found guilty by a jury were severally adjudged to pay a fine of $50 and the costs of the prosecution. Upon writ of error the judgments were affirmed by the Supreme Court of Nebraska, and the case has been brought here upon the ground that the final order in that court deprived the defendants, respectively, of rights specially set up and claimed under the Constitution of the United States.

It may be well at the outset to say that Congress has established no regulation as to the use of the flag, except that in the act, approved February 20th 1905, authorizing the registration of trade marks in commerce with foreign nations and among the States, it was provided that no mark shall be refused as a trade mark on account of its nature "unless such mark . . consists of or comprises the flag or coat of arms or other

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substance, or represented on any substance, and of any size, evidently purporting to be, either of said flag, standard, color or ensign, of the United States of America, or a picture, or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, color, or ensign, of the United States of America.

"§ 2375*i*. This act shall not apply to any act permitted by the statutes of the United States of America, or by the United States Army and Navy regulations, nor shall it be construed to apply to newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, or stationery for use in correspondence, or any of which shall be printed, painted or placed, said flag, disconnected from any advertisement." 1 *Cobbey's Ann. Stat. Neb.* 1903, c. 139.

insignia of the United States, or any similation thereof or of any State or municipality or of any foreign nation." 33 *Stat.* 724, § 5.

The importance of the questions of constitutional law thus raised will be recognized when it is remembered that more than half of the States of the Union have enacted statutes* substantially similar, in their general scope, to the Nebraska statute. That fact is one of such significance as to require us to pause before reaching the conclusion that a majority of the States have, in their legislation, violated the Constitution of the United States. Our attention is called to two cases in which the constitutionality of such an enactment has been denied—*Ruhstrat* v. *People*, 185 *Ill.* 133; *People ex rel. McPike* v. *Van De Carr*, 178 *N. Y.* 425. In the Illinois case the statute was held to be unconstitutional as depriving a citizen of the United States of the right of exercising a privilege, impliedly, if not expressly, granted by the Federal Constitution, as unduly discriminating and partial in its character, and as infringing the personal liberty guaranteed by the State and Federal Constitutions. In the other case, decided by the Court of Appeals of New York, the statute, in its application to articles manufactured and in existence when it went into operation, was held to be in violation of the Federal Constitution as depriving the owner of property without due process of law, and as taking private property for public use without just compensation.

In our consideration of the questions presented we must not overlook certain principles of constitutional construction, long ago established and steadily adhered to, which preclude a judicial tribunal from holding a legislative enactment, Federal or State, unconstitutional and void, unless it be manifestly so. Another vital principle is that, except as restrained by its own fundamental law, or by the Supreme Law of the Land, a State possesses all legislative power consistent with a republican form of government; therefore each State, when not thus restrained and so far as this court is concerned, may, by legislation, provide not only for the health, morals and safety of its people, but for the common good, as involved in the well-being, peace, happiness and prosperity of the people.

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* Ariz, Rev. Stat. 1901, p. 1295; Colo., 3 Mills Anno. Stat., vol. 3 Rev. Supp., 1891–1905, p. 542; Conn., Gen. Stat., 1902, p. 387; Cal. Stat., 1899, p. 46; Del., 22 Sess. Laws, p. 982; Hawaii, Sess. Laws, 1905, p. 20; Idaho, Sess. Laws, 1905, p. 328; Ill., Sess. Laws, 1899, p. 234; Ind., Acts, 1901, p. 351; Kans., Gen. Stat., 1905, p. 499, § 2442; Me., R. S., 1903, p. 911; Md., Laws, 1902, p. 720; Mass., 2 Rev. Laws, 1902, p. 1742; Mich., Pub. Acts, 1901, p. 139; Minn., Rev. Laws, 1905, § 5180; Mo., 2 Anno. Stat., 1906, § 2352; Mont., Laws, 1905, p. 143; N. H., Pub. Stat., 1901, p. 810; N. J., Laws, 1904, p. 34; New Mex., Laws, 1903, p. 121; N. Y., Laws, 1905, vol. 1, p. 973; N. Dak., Laws, 1901, p. 103; Ohio, Laws, 1902, p. 305; Ore., Gen. Laws, 1901, p. 286; R. I., Sess. Acts, Jan. & Dec, 1902, p. 65; Utah, Laws, 1903, p. 29; Vt., Laws, 1898, p. 93; Wis., Laws, 1901, p. 173; Wyo., Laws, 1905, p. 86.

Guided by these principles, it would seem difficult to hold that the statute of Nebraska, in forbidding the use of the flag of the United States for purposes of mere advertisement, infringes any right protected by the Constitution of the United States or that it relates to a subject exclusively committed to the National Government. From the earliest periods in the history of the human race, banners, standards and ensigns have been adopted as symbols of the power and history of the peoples who bore them. It is not then remarkable that the American people, acting through the legislative branch of the Government, early in their history, prescribed a flag as symbolical of the existence and sovereignty of the Nation. Indeed, it would have been extraordinary if the Government had started this country upon its marvelous career without giving it a flag to be recognized as the emblem of the American Republic. For that flag every true American has not simply an appreciation but a deep affection. No American, nor any foreign born person who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free Government. Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.

It may be said that as the flag is an emblem of National sovereignty, it was for Congress alone, by appropriate legislation, to prohibit its use for illegitimate purposes. We cannot yield to this view. If Congress has not chosen to legislate on this subject, and if an enactment by it would supersede State laws of like character, it does not follow that in the absence of national legislation the State is without power to act. There are matters which, by legislation, may be brought within the exclusive control of the General Government, but over which, in the absence of national legislation, the States may exert some control in the interest of its own people. For instance, it is well established that in the absence of legislation by Congress a State may, by different methods, improve and protect the navigation of a waterway of the United States wholly within the boundary of such State. So, a State may exert its power to strengthen the bonds of the Union and therefore, to that end, may encourage patriotism and love of country among its people. When, by its legislation, the State encourages a feeling of patriotism towards the nation, it necessarily encourages a like feeling towards the State. One who loves the Union will love the State in which he resides, and love both of the common country and of the State will diminish in proportion as respect for the flag is weakened. Therefore a State will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it.

By the statute in question the State has in substance declared that no one subject to its jurisdiction shall use the flag for purposes of trade and traffic, a purpose wholly foreign to that for which it was provided by the Nation. Such an use tends to degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of National power and National honor. And we cannot hold that any privilege of American citizenship or that any right of personal liberty is violated by a State enactment forbidding the flag to be used as an advertisement on a bottle of beer. It is familiar law that even the privileges of citizenship and the rights inhering in personal liberty are subject, in their enjoyment, to such reasonable restraints as may be required for the general good. Nor can we hold that any one has a right of property which is violated by such an enactment as the one in question. If it be said that there is a right of property in the tangible thing upon which a representation of the flag has been placed, the answer is that such representation—which, in itself, cannot belong, as property, to an individual—has been placed on such thing in violation of law and subject to the power of Government to prohibit its use for purposes of advertisement.

Looking then at the provision relating to the placing of representations of the flag upon articles of merchandise for purposes of advertising, we are of opinion that those who enacted the statute knew, what is known of all, that to every true American the flag is the symbol of the Nation's power, the emblem of freedom in its truest, best sense. It is not extravagant to say that to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression. As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the State erred in duty or has infringed the constitutional right of any one. On the contrary, it may reasonably be affirmed that a duty rests upon each State in every legal way to encourage its people to love the Union with which the State is indissolubly connected.

Another contention of the defendants is that the statute is unconstitutional in that, while applying to representations of the flag placed upon articles of merchandise for purposes of advertisement, it does not apply to a newspaper, periodical, book, pamphlet, &c., on any of which shall be printed, painted, or placed the representation of the flag disconnected from any advertisement. These exceptions, it is insisted, make an arbitrary classification of persons which, in legal effect, denies to one class the equal protection of the laws.

It is well settled that when prescribing a rule of conduct for persons or corporations a State may, consistently with the Fourteenth Amendment, make a classification among its people based "upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection." *Gulf, Colorado & Santa Fe Railway Co.* v. *Ellis*, 165 *U. S.* 150, 159–60, 165. In *Cotting* v. *Kansas City Stock Yards Co.*, 183 *U. S.* 79, there was a difference of opinion in the court as to what was necessary to be decided, but all agreed that a State enactment regulating the charges of a certain stock yards company, and which exempted other like companies from its operation, was a denial of the equal protection of the laws and forbidden by the Fourteenth Amendment. In *Connolly* v. *Union Sewer Company*, 184 *U. S.* 540, 552, 562–3–4, the question arose as to the validity, under the equality clause of the Constitution, as to the validity of a statute of Illinois, forbidding, under penalty, the existence of combinations of capital, skill or acts for certain specified purposes, but exempting from its operation agricultural products or live stock while in the hands of the producer. By reason of this exemption the statute was adjudged to operate as a denial of the equal protection of the laws, and was, therefore, void. The court observed that such a statute was not a legitimate exertion of the power of classification, rested upon no reasonable basis, was purely arbitrary, and therefore denied the equal protection of the laws to those against whom it discriminated. It said: "We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

The present case is distinguishable from the *Connolly* case. The classification there involved was of persons alike engaged in domestic trade, which trade, the court said, was of right "open to all, subject to such regulations, applicable alike to all in like conditions, as the State may legally prescribe." Now, no one can be said to have the right, secured by the Constitution, to use the country's flag merely for purposes of advertising articles of merchandise. If every one was entitled of right to use it for such purposes, then, perhaps, the State could not discriminate among those who so used it. It was for the State of Nebraska to say how far it would go by way of legislation for the protection of the flag against improper use—taking care, in such legislation, not to make undue discrimination against a

part of its people. It chose not to forbid the use of the flag for the exceptional purposes specified in the statute, prescribing the fundamental condition that its use for any of those purposes should be "disconnected from any advertisement." All are alike forbidden to use the flag as an advertisement. It is easy to be seen how a representation of the flag may be wholly disconnected from an advertisement and be used upon a newspaper, periodical, book, etc., in such way as not to arouse a feeling of indignation nor offend the sentiments and feelings of those who reverence it. In any event, the classification made by the State cannot be regarded as unreasonable or arbitrary or as bringing the statute under condemnation as denying the equal protection of the laws.

It would be going very far to say that the statute in question had no reasonable connection with the common good and was not promotive of the peace, order and well-being of the people. Before this court can hold the statute void it must say that and, in addition, adjudge that it violates rights secured by the Constitution of the United States. We cannot so say and cannot so adjudge.

Without further discussion, we hold that the provision against the use of representations of the flag for advertising articles of merchandise is not repugnant to the Constitution of the United States. It follows that the judgment of the State court must be affirmed.

It is so ordered.

Mr. Justice PECKHAM dissented.

True copy.

Test:

Clerk Supreme Court, U. S.